CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1820.*

West'n District. *September*, 1820.

RICHARDSON vs. TERREL.

RICHARDSON vs. *TERREL.*

APPEAL from the court of the fifth district.

A plaintiff appellant may give the bond of two individuals for his prosecuting the appeal. It is not necessary that he should give his own.

The party who puts interrogatories is concluded by the answer, unless he disproves it by two witnesses.

Brownson, for the plaintiff. This is a suit brought on a note of hand, dated 3d June 1813, for $2833, 33, payable in January 1815, on which there appears endorsed May 28th 1814, $166, 66 2-3, leaving a balance on the note of $2666, 66 2-3, which sum together with ten per cent interest from 1st February 1815, is claimed by the plaintiff in his petition.

The defendant has in his defence filed two notes, one dated 4th June 1813, for $1787, 50 and the

* The cases of this term are continued from the preceding volume.

West'n District. *September*, 1820.

RICHARDSON vs. TERREL.

other without date for $160, both payable on demand, making together the sum of $1946, 50.

Supposing that compensation were to be allowed for $1947, 50 against the sum of $2666, 66 2-3, and that the same took effect on the 1st of February 1815, it would leave a balance due by the plaintiff of $717, 16 2-3, exclusive of interest from that time.

Again, supposing the note of $160 should be considered as included in the one of $1787, 50, there would only remain that sum to be allowed in compensation, which would leave a balance due the plaintiff of $879, 16 2-3 exclusive of interest.

The district judge has however given judgment for the sum only of $383, 48 exclusive of interest. From this decision both parties have appealed.

With respect to the note of $160, the plaintiff contends that it has been included in the larger one, and was to be cancelled or given up. The only evidence of this is the oath of the plaintiff himself. He swears unequivocally to the fact. And what gives it some contenance is that the small note bears no date. It was taken it should seem in haste, as a loose memorandum, and from the confidential footing upon which every thing seems to have been transacted, between the parties, at the time, this note may be supposed to have been given, it is easy to believe that the plaintiff would acquiesce in a declaration

by the defendant that he could not for the moment lay his hands upon it, but that he would deliver it up or cancel it, whenever it was found. At any rate, the plaintiff has in substance stated this upon oath, and at the hazard of a prosecution for perjury, if he has stated it falsely, and it seems to me that he is to be believed, unless the contrary be proved. It is hardly to be presumed, that a man would hazard the consequences of perjury, for the paltry sum of $160, or that he would think to originate and fabricate such a tale, without any foundation for it in truth. *Civ. Code*, 316, *art.* 263 & 2 *Mart. Dig.* 160, *section* 9.

But, to examine the pretentions of the defendant: it is said:

1. That the plaintiff has engaged to cancel and give up the note, on which this suit is brought without demanding any thing upon it.

2. That the defendant has contracted to pay interest upon the two notes filed, in the defence. from the date of the largest and that as the note, on which this suit is brought, did not fall due until the 1st of February 1815, compensation did not take effect until that time; that then not only the defendant's two notes are to be compensated, but also the intermediate interest, which occurred upon them, from the date of the largest, up to the time of compensation.

West'n District. *September* 1820.

RICHARDSON vs. TERRELL.

I. As to the first point, I trust I need not detain the court long to shew the utter futility of the pretention. To prove the facts on which it depends, interrogatories have been put to the plaintiff. The answer thus drawn from him gives an express and explicit negative to all the questions contained in the interrogatories, and not only do not furnish evidence for the defendant, but, must be taken as evidence against him. *Civ. Code*, 316, *art.* 263 & 2 *Mart. Dig.* 160, *section* 9.

It is needless to enquire whether such a contract, as that alleged in the defence, which is in effect that the plaintiff should cancel and give up to the defendant the note on which this suit is brought, at a discount of twenty-five per cent, would be binding upon the parties, admitting it to have been fully proven. For it appears to me that there is no tittle of evidence to support such a contract, not the shadow of a pretence for it. On looking into the letters, from the plaintiff to the defendant, such an idea receives no countenance. It will be seen that, as early as February, before this contemplated arrangement with A. Lewis at Nashville, the plaintiff commenced writing to the defendant, informing him of his necessities for money, that he must make a sacrifice to obtain it, and requesting the defendant to sell his own and the Thruston's bonds for $14500, for cotton at $18 per hundred, thinking that he

could re-sell the cotton for $11 or 12, for ready cash, thus making a sacrifice of one third. But, it seems the exertions of Terrel to sell his own paper, if indeed he ever made any, proved fruitless. The bonds were not sold. In May following, Terrel proposed revisiting the states. It was thought that the note, on which this suit is brought might be negotiated to A. Lewis. Terrel undertakes to effect the negotiation and to facilitate the accomplishment of this object; Richardson authorizes him to sell the note at 25 per cent discount, which would give him $2000 to answer his necessities in the states. But, what does all this prove, but that the plaintiff was as ready to do a favour to the defendant, as it appears, he has been liberal in acknowleging favours received. His object was, not to give Terrel a speculation upon himself, but to raise for him, in an emergency, the money which he wanted at the price of almost any sacrifice. Had Terrel proposed to him, in direct terms, to annul the note at 25 per cent discount, he would have said "if you are my friend, Terrel, you may want this money, and I am willing to consent to any sacrifice to raise it for you, but you cannot wish to speculate upon me in my distress."

But, it seems that in September 1815, the plaintiff writes to the defendant in the states, using the following expressions: "In your last letter you beg

West'n District. *September*, 1820.

RICHARDSON *vs.* TERREL.

that I would not part with your first bond to me, I have it yet, and rest assured I will keep it until I deliver it to you, and with heartfelt sorrow it is I know, that you should have been paid what I owe you *long*, *long* before your note became due to me."

Now, if such stipulations and agreements, as the defendant alleges, had ever been entered into, is it probable that the defendant would be found *begging* that the plaintiff would not part with his bond? Would he not have claimed it as a matter of right? And because the plaintiff engaged not to part with it, but deliver it himself to the defendant, does it follow that the defendant intended to give up any of his rights up on it? That he intended no such thing appears clearly from the plaintiff's subsequent letter to Brent, dated a few days later, in which he says "Terrel's first bond I shall hold for him, as I owe him nearly the amount of it." This expression more explicitly declares the intentions of the plaintiff. They were to keep the note for the defendant, it is true, and as it was comparatively speaking nearly paid by the note due from the plaintiff to him, the plantiff was willing to wait until some convenient opportunity would enable them to exchange notes, and then to receive the balance due from Terrel. The defendant felt the advantage of having the note lie in the plaintiff's hands. He knew well, from the strict intimacy that existed,

that the plaintiff would not be urgent in forcing immediate payment; that time would be given to suit his convenience. Accordingly we see that the plaintiff rests quietly, without demanding the balance due him until the spring of 1818, and then for the first time learns the pretentions of the defendant that the note was settled.

I need not urge to the court that the defence set up supposes a *donation;* that a *donation* in the civil law is never presumed, but must be proved, and be executed by authentic act; that receiving it as a contract, it is a *shaving* one, and therefore would be illegal and void. All this becomes wholly unnecessary, because there is not, it appears to me, a tittle of evidence from which to presume the existence of such a contract, much less to prove it, and because it is absolutely disproven by the plaintiff's answers to the interrogaties.

II. As to the second point, I will not say what the plaintiff might have consented to, had the defendant been disposed to settle this business amicably. But, as he has thought proper to dispute every thing, as he has denied that any thing was due, and put the plaintiff upon his legal rights, the rules of law must decide the controversy. If in law he has a right to demand the interest claimed, then surely, I shall not be dissatisfied, if the court awards it to

West'n District *September*, 1820.

RICHARDSON *vs.* TERREL.

him. But, as I am not instructed to consent to it, under existing circumstances, the court will excuse me if I take a little time to show why I think he has not a legal right to demand it.

The defendant alleges that "the plaintiff owed him a large sum of money for cash lent and other services and favours rendered by the respondent to him to the full amount of $1947, 50 with ten per cent interest from the 4th of June 1813, until paid as will appear by the notes, and accounts, filed with this petition and made a part thereof."

The evidence, however, on which rests the claim for interest is contained not in the notes themselves, because they do not legally draw interest, but, on an expression in one of the plaintiff's letters which amounts, says the defendant, to a subsequent promise to pay interest. Before I examine the expression alluded to, I may justly be permitted to complain, that the defendant has never given the plaintiff any legal notice by the pleadings that he intended to rely upon a subsequent promise. He has said that this promise appeared from the notes, and accounts filed with the petition, but not a word about the interest being due by virtue of a subsequent promise. The plaintiff may therefore with justice complain of surprise, when letters not filed with the answer are produced to support such an allegation. He can hardly be supposed to be prepared to contro-

vert by proof of the fact of a subsequent promise when he had no notice that such a thing would be pretended, until the very moment of trial: nay, when he was led to suppose that such a thing would not be pretented, by having his attention called to the notes and documents filed in the suit, as the evidence upon which the claim of interest was founded. And it seems to me that it would be a real hardship for the court to receive these letters, as evidence of a fact, which is totally out of the pleadings, and concerning which one of the parties has consequently never had any opportunity to produce evidence. But, let us examine this evidence partial as it is, and see whether it makes out the claim.

"In making this trade and getting money, I shall directly pay you what I owe you, with good interest."

Does this amount to a contract? I think it does not. The first objection I make to it, as a contract, is that it is not a promise, made with the intention of *obligating* the party promising, which is essential to a contract. A contract is defined to be "une "convention par laquelle les deux parties réciproquement, ou seulement l'une des deux, promettent "et s'engagent envers l'autre à lui donner quelque "chose. J'ai dit promettent et s'engagent, car il n'y "a que les promesses que nous faisons avec l'intention de nous engager, et d'accorder à celui à qui

West'n District. *September* 1820.

RICHARDSON vs. TERREL.

" nous les faisons, le droit de nous contraindre à les " accomplir, qui forment un contrat et une conven- " tion. Il y a d'autres promesses, que nous faisons de " bonne foi et avec la volonté actuelle de les accom- " plir, mais sans une intention d'accorder à celui à " qui nous les faisons le droit de nous y contraindre; " ce qui arrive lorsque celui qui promet, déclare en " même tems, qu'il n'entend pas néanmoins s'en- " gager où lorsque cela résulte des circonstances ou " des qualités de celui qui promet, et de celui à qui " la promesse est faite." Again, "ces promesses " (the kind last mentioned) produisent bien une obli- " gation imparfaite de les accomplir, pourvu qu'il ne " soit survenu aucune cause, laquelle, si elle eut été " prévue, eut empêché de faire la promesse, mais elles " ne forment pas d'engagement, ni par conséquent " de contrat." *Pothier on obligations*, 1, *c.* 1, *sec.* 1, *art.* 1, § 1.

So, in the Spanish law, a contract is defined to be, " otorgamiento que fazen los omes unos con otros, " por palabras, e con entencion de obligarse, acci- " niendose sobre alguna cosa certa, que deven dar " o fazer, unas á otras." 5 *Partida*, *tit.* 11, *l.* 1.

From these authorities, it will be seen that the intention of the party to *obligate* himself *legally* is essential to the contract, that, without such *intention*, the obligation is an imperfect one, and does not amount to a contract. In the present case, I think,

that such *intention* was clearly wanting; that it may fairly be inferred from the circumstances, from the whole tenor of the letter, and from the expressions themselves, that the plaintiff never intended to give the defendant a *legal* right to demand this interest; but that he rather meant to assure the defendant that an act of generosity was designed him, if the trade could be effected. The form of the expression shews this. The plaintiff does not say I will pay you with good interest, but "on making the trade and getting money, I shall pay you with good interest." It is rather an intimation of generosity *intended* than a contract.

Besides, was nothing necessary on the part of the defendant to perfect this contract, supposing it to be one? When a consideration is given for a promise, the consent of both parties is clearly necessary; of one party on account of the promise and of the other party on account of the consideration, and when no consideration is given, when the contract is one of beneficence, and purely gratuitous, then the express consent of the *donor* is made necessary by our *Civil Code*, 220, *art.* 54. If, therefore, it is any thing more than an imperfect engagement, of which I have before spoken, it must be considered as a contract in which there was some thing given or to be given, for some thing received or to be received. Admitting then, for argument sake that

West'n District. *September*, 1820.

RICHARDSON *vs.* TERREL.

the expression amounts to a contract, is it any thing more than a conditional one, to pay interest on the happening of certain events? What is the consideration for this promise? Had it no consideration? It is perhaps void then, on that account. If there was a consideration, it must have been the effecting of the trade, which the plaintiff seems to have had so much at heart. Indeed, the very language is that of a conditional promise. "In making the trade and getting money, I shall directly pay you with good interest." Does he promise to pay interest unless the trade is made? Is not the making of the trade in the very language here used a condition precedent, to the performance of what is promised? How then can it be contended that the plaintiff is liable upon this promise, when that condition never was accomplished, when the trade never was effected nor the money obtained? By what law, is this condition to be dispensed with altogether in this contract, and the promise to be converted into an absolute unconditional promise to pay interest. And that too at ten per cent. Because the expression is "good interest." The very vagueness of the expression shews that the plaintiff had not a contract in view. When men enter into contracts, they obligate themselves to some thing more definite and precise, than what is contained in this loose expression to pay, "good interest." What is good in-

terest? The law has said five per cent is good legal interest; that six per cent is good bank interest, and that ten per cent is not good merely, but the best conventional interest. The court has a difficult task indeed to fix the precise meaning of the adjective good, as it relates to the per cent of interest. If we follow the rules of comparison which govern our language, it must mean the lowest interest. There five per cent is good interest as established by law, six per cent is better and ten per cent is the best. But all these difficulties are avoided by giving to the expression the meaning which the writer evidently intended, not a *contract* which might be enforced in a court of justice, but a general and loose assurance, that the plaintiff designed the defendant an act of generosity, if the latter would enable him to exercise it, by effecting the proposed trade; a sort of imperfect engagement which the law calls a pollicitation. *Pothier on obligations*, 1, *c.* 1, *sec.* 1, *art.* 1, § 1 & 2.

Brent, for the defendant. The plaintiff's claims is resisted on two grounds:

1. That the defendant has satisfied the sum claimed, by an agreement made between the petitioner and himself, in 1814.

2. That, if the said sum was not entirely satisfied by said agreement, he is only indebted to the peti-

West'n District
September, 1820.

RICHARDSON
vs.
TERREL.

tioner in the sum of $383, 43 with ten per cent interest from 1st of February 1815; it being the balance due on said note, after deducting $1947, 50 due to the defendant by the petitioner, with ten per cent interest from the 4th of June 1814 until the 1st of February 1815, when compensation took place, and the interest on $166, 66 paid to the petitioner on the 28th of May 1814.

The court below was of opinion that the defendant could not succeed upon the *first ground*, but that he could upon the *second*, and gave judgment accordingly, in favour of the petitioner, for the said sum of 383 *dollars* 43, *with interest as before statsd.*

The petitioner's counsel has stated that from this judgment *both* the petitioner and defendant have appealed. I beg leave *in part* to correct this statement in the extent it is made. It is true that the defendant did file his petition of appeal, but being anxious to put an end to litigation, he abandoned the appeal and has not thought it proper to take it up, for this appeal does not come up, at the instance of the defendant, but is brought here by the petitioner. The defendant denies that ever he brought up the appeal: it was done alone by the petitioner.

Before I proceed to argue this cause, I must pray the court that the appeal be dismissed, because it has not be regularly taken. The law requires, that the party praying the appeal, should give *good and*

sufficient security, and that the *judge* granting the appeal should *take the security*. 1 *Mart. Dig.* 438.

1. The party (petitioner) has given no security.
2. The security was not taken by the judge.

I. The persons, who have signed the bond filed, are as good as could be required, but the party taking the appeal did not, in the words of the statute, *give* them as security. In order to be a *second* or *security*, there must be a *first* or a principal. In this case the bond *is not signed* by the appellant, nor is he a *party to it;* of course, the persons who signed it cannot be considered as *his sureties*, but as *principals* themselves. Why does the law require that the party should have security? The answer is direct, that he may be indemnified, and if injured have his recourse against the party, and his security. But I will ask the learned counsel for the petitioner, in what manner a suit could be brought against an appellant and persons signing a bond similar to the one filed in this case; the appellant could not be sued upon that writing, because *he is no party to it*, and if redress be had at all, against these persons, how could it be obtained?

But, put reason out of the question, the law expressly declares that "the party must subscribe the appeal bond with his securities;" for, says the statute, if the appeal be not regularly taken, "the bond,

West'n District. *September*, 1820.

RICHARDSON vs. TERREL.

by him and his securities subscribed, may be delivered to the opposite party to be put in suit." 1 *Mart. Dig.* 440, 5; IX, about ten lines from bottom and to bottom of the page, and in same book 432, 1, XIX. The very form of the bond is given.

Was such bond given? It was not. I challenge the opposite party to shew it. The only instrument of writing, purporting to be a bond, is one not *signed* or *subscribed by the appellant*, but only by *John Brownson* and *John Muggat*, not as *securities* to the appellant, but only as *principals*, obliging themselves to pay 250 dollars to the defendant, if Sam. Richardson does not succeed in an appeal. *See bond*, which ought to be in record.

If such bond is *not admitted*, or if it does *not appear in the record*, and only the clerk's statement of security being given, a "dimunition of the record is suggested," and it is hoped that the court will order the record to be *completed* by the clerk of the court below.

If then the appellant *has not given security* as required by law, the appeal *must be dismissed* upon this ground.

II. The expressions of the statute allowing, appeals, are "and every judge allowing an appeal, shall take a good and sufficient security." 1 *Mart. Dig.* 438.

It is made the duty of the *judge* to *take* the security. No other person can do it. As well might it be contended that the judge could authorise the clerk or any other person to give *judgment*. The law declares that the judges *shall give judgment*, and can they authorize another person to do it? If so, the law declares that the *judges shall take the security*, and they cannot authorize another person to take it. It is the duty of the *judge alone* to approve the *goodness* and *sufficiency* of the security. It has not been done in this case—See the *petition of appeal*. The order of the judge is that the petitioner *do give security* in a certain sum: it does not appear that the security was *ever taken* by him.

The law contemplates clearly that the security should be *taken by the judge*, and for that purpose requires that the bond with security should be presented with the petition of appeal—Why? That the judge may approve the security. The act, regulating the mode of taking an appeal, leaves the form of proceeding, *the same as it was formerly*, to the late superior court—and the law declares the form of taking an appeal to that court, to be "that the party applying for an appeal, shall file his petition of appeal, together with one sufficient security." 1 *Martin Dig.* 430. The reason of it is that the judge may approve, as I have said before.

West'n District. *September* 1820.

RICHARDSON vs. TERREL.

But, should the court be of opinion, that the appeal is regularly before them:

I. In support of my first ground of defence, I will observe that the amount for which this suit is brought is for 2666 dollars 66 2-3 cents, *not due until 1st February* 1815.

It appears by the notes of hand of the petitioner filed in the record that as far back as 4th of June 1813, the petitioner owed the defendant a large sum of money to the amount of 1947 dollars 50 cents, which was for *money lent* as will appear by the *acknowledgment of the petitioner* in his letters to the defendant. In the petitioner's letter dated 1st of February 1814, he says: "I now write you to do what I have very frequently done, which is to ask a favour," and in the same letter, after asking the favour spoken of, he says he wishes to succeed in the *trade* he asks the defendant to make for him, that he might pay the defendant. His words are: "then immediately I will pay you." He also speaks repeatedly of the many favours done him by the defendant and says they will *never be forgotten.* In another part of the same letter, after complaining of his difficulties, the petitioner acknowledges the use he always had of the defendant's money and regrets since he had moved to a distance from the defendant, the want of his *fatherly purse.* His words are: "I

have but very little money to spare in travelling in these days, I assure you, since I have lost your more than fatherly purse to me." Thereby clearly admitting that *the money he owed the defendant*, was for cash advanced to him in 1813, before he left the defendant, whose *liberality*, in supplying his wants, even surpassed the *feelings of a father*.

In another letter of the petitioner, dated March 19th 1814, he repeats the same acknowledgments of favour, and says if the defendant could succeed in making a sale of some property for him, he *would be enabled to pay him*, and that the defendant "should to the end of his days have his gratitude for his godness to him."

In another letter dated 27th September 1815, the petitioner writes to the defendant and says: "In your last letter, you beg I will not part with your first bond to me, I have it yet and rest assured, I will keep it, until I deliver it to you, and with heartfelt sorrow it is, I know, that you should have been paid what I owe you long long before your note became due to me."

I also refer the court to the instrument of writing given by the petitioner, upon the 27th May 1814, to the defendant, which authorizes the defendant to sell the note, upon which this suit is brought, *for about* 2000 *dollars*, or at a discount of 25 *per cent*, which is nearly the same thing. For the amount

West'n District. *September*, 1820.

RICHARDSON vs. TERRELL.

then due on the note, as will be seen by a reference to it, was 2666 dollars 66 2-3, and the discount of 25 per cent, would reduce it to the same thing, and in the petitioner's letter of 17th May 1814, to Alexander Lewis of Nashville Tennessee, he "prays the said Lewis to pay 2000 dollars" to the defendant.

From this statement of the evidence, the court must be satisfied that the petitioner and the defendant *did make the agreement stated* and that the full amount due upon said note, was considered by them both as settled. They will observe that the amount due to the defendant, for *money lent* to the petitioner *from June* 1813, *under circumstances* as detailed in the letters, was nearly 2000 dollars or at least the petitioner so considered it, as he authorized the defendant to sell the note to raise that sum, at a discount of 25 per cent, and also requested Lewis to pay that sum to the defendant—nor was it more than *justice* in the petitioner. The money "had been due to the defendant for a long time," and the note of the defendant would not become due "at the time for almost a year," and the *presumed exchange* which the defendant states was agreed to, if the money was received at Nashville, *was not more than equal*, allowing the defendant interest on his money due by the petitioner "from June 1813 to February 1815," when the defendant's note became due—besides which the defendant is a man *engaged in com-*

merce, and his money would have been *more to him*, than the difference, between the *two* notes. This the petition shews, and, in offering the note to him *due sometime since* for what was *then due*, he only did what an honest man would have done, alive to the *former favours*, rendered by a friend.

That such an arrangement was made, is clear from the petitioner's letter of 27th September 1815, wherein he expressly promises "to keep the note until he delivers it into the hands of the defendant," and expresses "heartfelt sorrow that the defendant had not been paid what he owed him long long before the note became due." If the petitioner had not considered the note as settled in the way contended for by the defendant, he would not have promised to keep and deliver the note into the hands of the defendant. His expressions would have been different, such as, I will keep your *first note* and "deliver into your hands alone," when the *balance is paid.* But why keep this *first note* alone, if *it was not paid?* Why not trade it, as well as the other notes traded to Hall, as stated in the last mentioned letter of the petitioner? Why this great attachment to this note? The reason is obvious. The defendant did not get the money in Nashville, and as agreed between him and the petitioner, *he wrote to the petitioner* that he would take *his first note* in payment of what the petitioner owed him and requested the

West'n District. *September*, 1820.

RICHARDSON vs. TERREL.

petitioner to keep it for him, and not to pass it to any other person, which the petitioner promised to do in his last mentioned letter of the 27th September 1815, as in record. If such was not the *fact*, why are not the *defendant's letter produced?* No doubt, but the nature of this transaction would be disclosed, and the very keeping of them back, shews that the agreement was as contended for by the defendant. "And as the petitioner had notice by defendant's answer that his (petitioner's) letter would be produced on the trial, he ought to produce defendants." But, says the petitioner's counsel, if such arrangement had been made between the petitioner and defendant, why did the defendant request the petitioner not to pass his *first note*, which is the one on which this suit is brought? The answer is easy. The agreement between the petitioner and defendant was conditional, as will be presumed from what I have shewn before, and was only to take effect, if the money was not received at Nashville, and the defendant had, of course, to write back to the petitioner, to inform him that the money was not received, and to request him not to pass his note as he would take it himself according to agreement, it being the best he could do. For, if he had not *preferred the money* to the exchange, he would have taken the note in Mississippi and not gone on to Nashville to try and get the *same money* for *his*

note. But, money was his object—and it was a loss and injury to him to take the *note in lieu thereof*. Besides which, the petitioner at *that time* owed him more than 2000 dollars, for his two notes, amounting to 1947 dollars 50 cents, and he was entitled by the written promise of the petitioner, contained in his letter dated 19th March 1815, to allow good interest on the same.

Another reason can be given. why the defendant wrote to the petitioner not *to pass his first note*. The defendant had reasons to fear that the petitioner would do it, inasmuch as he had already done it without giving any credit upon it for what he justly owed him, and notwithstanding the agreement they had made, as will appear by the court *referring to said note*, in the record, upon the back of which are *two* assignments at *different times*, to *different persons* of the said note, which the petitioner made and afterwards it appears took the note back. This certainly was enough, if no other reason existed, for the defendant to make the request.

The transcript of the record is filed in this court, and I have never seen it, and this argument is made from the *original paper*, if the clerk has omitted the *two crossed assignments* upon the back of this note, and the fact is denied by the petitioner, "a dimunition of the record is suggested," and I hope this court will apply the remedy.

West'n District. September, 1820.

RICHARDSON vs. TERREL.

The petitioner contends that the *existence* of such an agreement is contradicted by *his answer* to the *interrogatories* proposed by the defendant, and his counsel has cited authorities to show that the *answer* as made by him, must be taken as evidence in his favour. I admit the general principle. But then these answers may be *disproved by other testimony;* by *literal proof;* here the writings, letters and copies disprove. *Civ. Code*, 316, *art.* 263, 2 *Mart. Dig.* 60, *n.* 9.

But, perhaps the counsel for the petitioner may contend that the literal testimony, in this case, is not *positive*—but, I think, it is as *positive* as the nature of this case attended with all its circumstances could admit of. Besides which, presumptive and circumstantial evidence must be taken *where there is no positive*, and often *is stronger than the positive testimony.* The present, I think, is a case of the kind. In *criminal* cases, such is the doctrine and how much stronger ought it to be *here. Philips' Ev.* 110, 124, *Index* 14, 1 *East.* 223, 2 *M'Nally E.* 575 to 580.

II. By referring to the record, it will be seen that the defendant held notes of the petitioner, to the amount of 1947 dollars 50 cents; one of the notes is dated 4th June 1813, and the other without date is for only 160 dollars. The petitioner acknowleges his signature to both of these notes, but, says the

small one of 160 dollars, without date, is included in the large one of the 4th June 1813. The *contrary is proved*, by the letters and documents before referred to. In the writing to the defendant of the 17th May 1814, the petitioner authorises Terrel the defendant, to sell *his first note* of 2666 dollars 66 2-3 cents, for a discount of 25 *per cent*—and in his letter of same date to Lewis of Nashville, he requests him if possible, to let Terrel the defendant, have *two thousand dollars*. If the little note of 160 dollars had been paid, why would the petitioner have "impliedly acknowleged in these two writings," that he owed Terrel *about the sum due upon the two notes*, and have given an order for it. It certainly would not—and the small note is as justly due as the large one—and Richardson the petitioner, in his letters, states that he had borrowed *money from Terrel oftener than once*—then taking it for granted that the sum of 1947 dollars 50 cents amount of both notes, was due to the defendant—I will next shew that the petitioner assumed to pay *interest on it* and *at the rates of ten per cent.*

But, before I notice this, I will make one observation, *as to the date of the note of* 160 *dollars*. The court must be presume that it was of an older date than 17th May 1814, when the petitioner acknowleges he owed the defendant about the sum claimed

West'n District. *September* 1820.

RICHARDSON vs. TERREL.

by him in his order on Lewis at Nashville, and further, the court will presume that it was given before Richardson left the Attakapas, and whilst Terrel's "fatherly purse was offered to him," as the petitioner calls it, and from his letter of 1st February 1814, it is proved that the petitioner left the Attakapas previous to 1814, and during some time in 1813—so that the note, it is reasonable to suppose, was given about the same time that the large one was, which was in June 1813—and the petitioner states in his answer to the interrogatories, "that it was given before that time"—so that it fixes the time for both notes, to at least the 4th June 1813, from which time the defendant claims ten per cent interest, upon the sum due him—and to support this claim offers, in evidence, the petitioner's letter of the 19th March 1814, in which he says when he disposes of certain property or notes therein mentioned "I shall directly pay you what I owe you with good interest and you shall to the end of my days have my most earnest and best wishes for your great goodness to me." Here is a *positive* and *written assumption* to pay interest, *good interest.* From when? Why, most certainly from the time the money was due on 4th June 1814. For, when a man says I will pay you a certain *sum of money without interest*, he certainly means with interest *from the day due*, and such was the intention of the petitioner, to be gathered from all

his letters; for he often expresses his regret that he had not the money to pay the defendant.

But, says the petitioner's counsel, the expression *good interest* only means *five per cent.* I differ in opinion with him, and in order to ascertain what the petitioner meant by *good interest*, we have only to refer to *his letters*, and to common parlance—when a man says lend me some money and I will pay you *good interest*, or when a debtor says indulge me for a year and I will pay you *good interest*, or when a person says to his friend who has advanced him money in his difficulties and is unable to return it when called for, as soon as I can command money, you shall be immediately *paid with good interest* and my *gratitude* for your frequent favours, most certainly such *man*, such *persons* mean not the *lowest interest* the law gives, but intend to act justly, liberally and to give an interest that would be an inducement, or at least an indemnification for the *favour* or the delay—that such were the intentions of the petitioner is clear from the manner in which he expressed himself, and after the *many favours he had received* from the defendant, I think he asks for this *forced construction* upon what is called *good interest*, with a very ill grace. The interest given for money lent in this state is never less than *ten per cent.*

It is clear then that the petitioner owed the de-

West'n District
September, 1820.

RICHARDSON
vs.
TERREL.

fendant 1947 dollars 50 cents, with ten per cent interest from the 4th June 1813, until 1st February 1815, when the defendant's note for a larger sum became due, and that according to the laws of this country a *compensation* took place to the amount of the principal and interest due to the said 1st February 1815. *Civ. Code*, 298, *tit. Compensation.*

Upon the 1st February, the principal due to the defendant was 1947 dollars 50 cents and the ten per cent interest on that sum from 4th June 1813, amounted to the sum of 2283 dollars 18 2-3 cents, including ten per cent interest upon the sum of 166 dollars 66 2-3 cents, advanced by the defendant on the note, upon the 28th May 1714, as will appen by a reference to said note—the said sum being credited thereon by the petitioner—and which said sum being justly due to the defendant upon that day, from the petitioner, was deducted from the sum of 2666 dollars 66 2-3 cents, claimed by the petitioner and judgment was given for the sum of 383 dollars 48 cents, the balance due to the petitioner, with ten per cent interest from 1st February 1815, until paid.

The judge, in giving judgment for this sum, was governed by commercial and legal calculations, made in all such cases—he first calculated the interest upon the 166 dollars 62 2-3 cents, advanced by the defendant upon the 28th May 1814, as receipted on

said note by the petitioner, and then the interest due upon the two notes of the petitioner from 4th June 1813 to 1st February 1815, and adding all together struck the balance due to the petitioner for which judgment was given—this, certainly, was *fair*, *just* and *legal*—nor ought the petitioner to complain of it.

The petitioner contends that the judgment ought to be for a greater sum—and that the defendant is only entitled to a deduction of 1787 dollars 50 cents, the amount of the one note, and that *without interest*—after having *read the petitioner's letters*, the court must be satisfied that the petitioner does not act justly by the defendant, after acknowleging his frequent *favours*, *loans*, &c., he wishes to put him off without even allowing *interest*. If any thing could prejudice so enlightened and impartial court, as the present, surely such an *ungenerous attempt* would have its weight. But I turn from it, and will shew, from *written acknowlegements* of the petitioner, that this never was understood by him, and that until this suit was brought, he never conceived that the defendant owed him as *much money* as he *now aks* for, but on the contrary, long *after the note was due* on 16th October 1815, he wrote to Brent, who signed the note with the defendant in the following words: "Terrel's (defendant) first bond I shall hold for him as" "*I owe him nearly the a-*

West'n District. September, 1820.

RICHARDSON vs. TERREL.

mount of it." Here are the *declarations* and *avowals of the petitioner*, after the note had been long due, when no suit appeared to be contemplated that the defendant had *ready paid* the note that the "petitioner himself nearly owed him" the *amount* of the note which is 2666 dollars 66 2-3 cents. After this, how can the petitioner with any face, contend that there is a *large amount* due to him, according to his argument, with the interest due on his note of upwards of 1000 dollars, at the least 717 dollars 16 2-3 cents without ten per cent interest from 1st February 1315? If this sum with ten per cent interest had been due, would the petitioner have written upon 16th October 1815, that there was but a small balance due, that the "amount of the note was nearly paid to him," as he "owed the defendant nearly that sum?" Most certainly not, and this avowal of the petitioner, in the letter of 16th October 1815, shews that he considered the balance due but "a trifling, not more than the judgment rendered," if as much.

This avowal of the petitioner clearly shows that the small note of 160 dollars never was included in the large one, and when united with the order of 2000 dollars on Lewis and other circumstances, must set aside the answer of the petitioner as to this fact.

I deem it unnecessary to answer the *various points*

embraced in the argument of the counsel for the petitioner—I have answered only such as I deem connected with the question before the court. His arguments and authorities as to *donations* have no relation to the present facts in issue—as to the complaint of surprise by the introduction of the letters—he had notice of the letters, for they "are referred in the defendant's answer" with which they *were filed*, as evidence, upon which the defendant relied—even if they were properly received, and good evidence. If they were not, "the petitioner ought to have excepted upon the trial." It is now too late. He himself has attempted to use them as evidence against the defendant.

MARTIN, J. delivered the opinion of the court. This action is brought on a promissory note of the defendant for 2833 dollars 33 cents, dated June 3, 1813 and payable in July 1815. He pleaded the general issue, and further, that he had long satisfied the plaintiff, for the said note—that, long before its execution, the plaintiff owed him 1947 dollars 50 cents, with ten per cent interest from the 4th June 1813, for cash lent and services and favours rendered: referring to two notes of the plaintiff of that date, one for 1787 dollars 50 cents payable on demand, the other for 160 dollars payable on demand, without a date, and written with a pencil, and the plain-

West'n District. *September*, 1820.

RICHARDSON vs. TERREL.

tiff agreed with him that if the said sum could not be procured from A. Lewis of Nashville, the note, on which the present suit is brought, would be considered as paid and satisfied, and the plaintiff gave him a power to sell said note—which not being able to effect, he wrote he took said note for himself and wrote to the plaintiff to keep it for him.

The notes are annexed to the answer and the plaintiff was called upon to answer on oath.

1. Whether they were not in his hand writing and subscribed by him?

2. Whether he did not agree with the defendant that, if he could not sell the note sued upon for the sum mentioned in the power, or if the money could not be obtained from A. Lewis, the note would be considered as satisfied and he would keep the sum for the defendant and whether he did not offer to the defendant to exchange the note sued upon for what the plaintiff owed him?

3. Whether, when he gave power to the defendant to sell the note, he did not consider that the latter might, if he thought proper, take the said note for himself, and consider himself the purchaser and owner of it, on the terms at which he was empowered to sell it: and whether the defendant did not write him, that he had been unable to sell the note and desired that he might keep it for him?

The power alluded to, in the answer and inter-

rogatories is annexed thereto. By it, the defendant is authorized to sell his bond, payable to the plaintiff, in June 1815, for 2000 dollars and upwards, at 25 per cent discount per annum, and the plaintiff promises to furnish the bond, on application after the sale.

In answer to the interrogatories, the plaintiff says that he presumes the notes and power, annexed to the answer, are in his own hand writing and subscribed by him: as he gave two notes for the sums mentioned in those referred to: the small one having been included in the other, and to be given up on demand or cancelled?

The second interrogatory was answered in the negative; the plaintiff adding that the object of offering the note for discount, was to pay the note of 1787 dollars 50 cents, and the balance was to be received by the plaintiff from the defendants on demand. It was understood the plaintiff was not to part with the defendant's note, but to collect it from him.

The first part of the third interrogatory was answered in the negative; as to the second, the plaintiff declared that the defendant wrote to him from Nashville, June 14, 1814, that the money was not procured and requested him by letter from Brunswick, December 13, 1814, to retain the note in his hands: which two letters, with one from New-York,

West'n District. *September* 1820.

RICHARDSON *vs.* TERREL.

of November 20, 1815, are the only communications received by the plaintiff, from the defendant from the time the power of attorney was given till he was threatened with a suit.

The district court, considering that the law and evidence were in favour of the plaintiff, gave judgment against the defendant for 383 dollars 48 cents, with interest at 10 per cent from February 1, 1815.

The statement of facts consists of the notes referred to in the petition and answer, and of several letters from the parties.

Both parties prayed, obtained and gave bond for an appeal, but the record was brought up, by the plaintiff only; the defendant's counsel disclaiming his appeal.

The defendant prays that the plaintiff's appeal be dismissed, because there was not any bond *given* by the plaintiff or *taken* by the district judge.

The defendant's counsel infers that the bond was taken by the clerk and not by the judge, from the order of the latter, on the petition of appeal, that the appeal be granted on the petitioner giving *security as directed by law.* The record shews that the bond was given, which implies that it was *taken;* and we are to presume, in the absence of any proof of the contrary, that it was taken by the person, whose duty it was to take it.

The law made it the duty of the judge to take

security for the costs, and the appellant is bound to no more. To give security for costs is to secure the payment of costs. This certainly may be done otherwise than by executing a bond with a surety; it may be done by the deposit of a sum of money, by that of bank notes, if there be no doubt of the solvency of the bank. In the present case, it was done by the deposit of a bond, executed by two individuals, the solvability of whom is not disputed, by which they bound themselves to the appellee, in the sum ordered by the district judge, for the performance by the appellant of the decree of this court. Is not this a security for the payment of such costs as this court may decree the appellant to pay? We believe it is. Had the appellant executed the bond, with one of these individuals, the appellee would not complain. Yet his security would be less: as the appellant would not be bound to less nor less effectually; for a promise, to pay what a court will decree one to pay, adds nothing to the obligation.

The defendant declining to be considered as an appellant, we have only to enquire whether too much was not allowed to the plaintiff. This perhaps does not dispense us to inquire whether, as he contends, the plaintiff did not agree that the defendant's note should be considered as satisfied. For, if we were satisfied of that, it would be clear that

West'n District. *September* 1820.

RICHARDSON vs. TERREL.

we could not amend the judgment of the district court, so as to allow to the plaintiff a larger sum.

The defendant's note is not denied: we find nothing in the plaintiff's letters, which proves that it was to be considered as paid or satisfied by the defendant's claim on the plaintiff, nor that the plaintiff made any absolute promise to pay interest, or that the contingency, on which he promised to pay interest, happened.

The plaintiff is clearly entitled to the amount of the defendant's note, 2833 dollars 33 cents, from which 166 dollars 33 1-3 cents, which were paid before the note became due, are to be deducted, but without the allowance of any interest. The defendant is further entitled to a credit for 1787 dollars 50 cts. for the amount of the plaintiff's note, on which nothing authorises us to allow him any interest. These two sums make that of 1954 dollars 50 cts. to be deducted from the amount of the defendant's note, which leaves a balance of 879 dollars 17 cents, which the plaintiff is entitled to recover, with interest from the date of the note, at ten per cent a year, as stipulated in the note, till paid.

The defendant having resorted to the plaintiff's conscience to establish the note of 160 dollars, as well as the large one, and the plaintiff having sworn that the amount of this first note was included in that of the other, and that the defendant promised

to cancel or surrender it, the latter must be concluded by the plaintiff's answer, which perhaps derives verisimilitude, from the circumstance of the note being written with a pencil and being without a date.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of eight hundred and seventy-nine dollars and seventeen cents. $879 17, with interest at ten per cent per annum, from February 1, 1815, till paid, with costs of suit in both courts.

TURNBULL vs. *CURETON*, *CURETON* vs. *TURNBULL*.

When every thing in an instrument seems right and clear, but the meaning of it is uncertain, the proof of the fact, which may remove the doubt, is admissible.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. Judgment had been given in the district court, in the first of these cases, and an appeal from it claimed by the defendant Cureton, when the second suit was instituted by him upon the same matter in dispute. His adverse party, Turnbull, pleaded against it the authority of *res judicata*—and the plea being

West'n District. *September*, 1820.

TURNBULL vs. CURETON.

CURETON vs. TURNBULL.

not sustained by the court, the cause was investigated, tried and judged, as if no judgment had ever been rendered on the subject.

The judge was certainly correct, in considering a case pending before the court of appeals, as one which had not acquired the authority of the thing judged; though he was probably mistaken in allowing the same parties to prosecute a second suit, on the same subject, while the first was pending. Both suits, however, being now before us, and the law making it our duty to disregard defects of form, and to attend only to the rights of the parties, we will proceed to investigate these cases together, as cross actions consolidated in one.

The dispute here arises from the difficulty of locating three grants of land, which are of the same date, and the surveys of which were not returned into the land office of the United States for this district, as required by the certificate of the commissioners.

These three grants were formerly united in the hands of one person, Abraham Martin, now deceased, who obtained from the commissioners a separate certificate for each. After Abraham Martin's death, each of these tracts was sold, by the name of the original grantee, so that each purchaser has a right to the quantity of land, mentioned in the certificate of the commissioners, and to the

location which it calls for, as far as that can be ascertained.

Of the three tracts, Turnbull has brought the two upper ones, to wit: Dowd's grant for two hundred arpens, and Garnett's grant for four hundred. Cureton is the purchaser of the lower tract or John Tear's grant of seven hundred and fifty-six arpens. These grants call to bound upon each other, and none of them are limited by any fixed line; nor is there any written evidence that the lower line of the land of Eleonore Nevill, by which Dowd's tract is said to be bounded, is fixed in any particular place. In this deficiency of written proof, to fix the limits of these respective tracts, recourse must be had to parol testimony.

We have been called upon to declare whether parol evidence can be admitted in a case like this, to explain that which is left doubtful in the title—and although the parties do not appear to have excepted to the introduction of the oral testimony, which is spread on record, we have no objection to state it as our opinion that it was properly admitted. A grant, which gives to the party a certain tract of land, said to bind on the land of another person, the situation of which is also uncertain, contains that defect which is known in law by the name of latent ambiguity. It may be explained by parol evidence, so far as to shew what such limits ought

West'n District. *September*, 1820.

TURNBULL vs. CURETON.

CURETON vs. TURNBULL.

to be: for, without such explanation, the grant would have no effect. The doctrine upon this subject is that when every thing in an instrument seems right and clear, but the meaning of it is uncertain, the proof of the fact, which may remove the doubt, is admissible. On this matter, we refer to *Peake's Evidence*, *chap.* 2, *sect.* 5, and to *Philips's Evidence*, *chap.* 10, *sect.* 1.

To find out the limits, by which these different grants ought to be bounded, we have one fact sufficiently ascertained: which is that the gulley marked on the plat near the cotton gin of Turnbull, was always considered by the original settlers, Tear and Garnett, as their common boundary; in corroboration of which fact, it is also in evidence that Garnett lived four or five arpens above the gulley, and Tear five or six arpens below it. In locating the lands of two adjoining settlers, who obtained grants for the land on which they actually lived, but without a sufficient description of their limits, it would certainly be a safe rule to run a line between them at an equal distance from each settlement. Should this be done here, it would place the line near the very spot, which the witnesses point out, as the boundary understood between the original grantees. We think, therefore, that this is the place, where the line of division between the lands of the present parties ought to be fixed.

The next enquiry is, how shall this line run? It has been the almost invariable practice in this country, in locating grants said to have their front on a water course, to run the lateral lines at right angles with the front, wherever that could be done. So, if there was in this case no evidence concerning the direction of these lines, we would deem it reasonable to order them to be run according to the common practice, which would, we think, bring them very near the direction represented in the plot filed in this record. But, independently of that, one of the witness has positively sworn that the lower line of Eleonor Nevill, now Eleonor Briggs, runs nearly East. That being the boundary between her and Dowd's grant, and Dowd's grant adjoining Garnett's, the direction of their lines must be the same.

As to the manner, in which Cureton may locate his grant of seven hundred and fifty-six arpens, it is a point which, we think, cannot be decided between the present parties. It is enough to say that his upper limit, on bayou Robert, ought to be fixed at the mouth of the gulley, immediately below Turnbull's cotton gin—and that his pretentions, to run his upper line parallel with the back line of Alexander Fulton, are not maintainable—because the grants of Garnett and Dowd, which are described to have a determinate number of arpens in front,

West'n District
September, 1820.

TURNBULL
vs.
CURETON.

CURETON
vs.
TURNBULL.

must be located conformably to that description—and because his own certificate calls not for any particular quantity of land in front, nor for parallel lateral lines, nor for any boundaries, either above or below: but has left the land to be surveyed, it seems, as the locality will permit, in the following words: "forty arpens depth with so much front, as will include the quantity."

It is therefore, ordered, adjudged and decreed that the judgments rendered by the district court in these cases be annulled, avoided and reversed—and this court, proceeding to give such judgment as they think ought to have been given below, do further adjudge and decree that the lower line of Walter Turnbull's land be fixed at the mouth of the gulley, immediately below his cotton gin, running from thence parallel to the upper line of Dowd's grant adjoining the land of Eleonor Biggs—and it is further adjudged and decreed that each party pay his own costs, in both courts.

Johnson and *Wilson* for Turnbull, *Baldwin* for Cureton.

DONEGAN'S HEIRS vs. *MARTINEAU & AL.*

APPEAL from the court of the sixth district.

Actual possession of a part, with title to the whole, is possession of the whole.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs claim a tract of land in the possession of the defendants. Their titles derive as follows: In the year 1795, Thomas Thompson petitioned the Spanish government for a tract of ten arpens front on the left side of bayou Bœuf, with the ordinary depth, adjoining below the bayou Robert and bounded above by the domaine. The petition or *requête* was presented to the commandant of Rapides, who certified, at the foot of it, that the land was vacant. One year after, Thomas Thompson sold to Wm. Donegan, the plaintiff's ancestor, such right as he may have acquired under that petition. No further step was ever taken by Thompson or his successor, until the year 1811, when Donegan exhibited his *requête* to the commissioners of the land office and obtained from them a confirmation of his claim, such as it was. Neither Thompson nor Donegan ever were in possession of the land. The title is of the weakest kind, and ought not to prevail, except against no title at all.

One of the defendants, Roger B. Marshall, pleads title under Frederic Myers, who, as early as 1797, obtained from the Spanish government a complete

West'n District. *September*, 1820.

DONEGAN'S heirs *vs.* MARTINEAU & al

patent for a tract of fifteeen arpens front on both sides of bayou Bœuf.

He further pleads prescription under that title.

The other defendant, Julien Deshautel, alias Lapointe, pleads title under a certificate of the said commissioners, issued in favour of his father, and relies also on prescription.

The titles of these two defendants being altogether unconnected and of different natures, they shall be examined separately.

The patent of Frederic Myers, under whom Marshall asserts his right, is admitted to be a complete and final title. The only thing in dispute between the parties is as to its location. The plaintiffs would have it to begin five arpens, lower down than the defendants place it. In the patent itself there is no reference to any natural object, which can fix the precise spot of the location. Recourse, therefore, must be had to other testimony to ascertain it. To find out the limits, within which the party and those who held under him, possessed this tract, the several acts of sale, by which the property passed from one hand to another, are, no doubt, proper evidence. From them may be seen what the party and his successors considered as the lower part and the higher part of the tract. To fix the places where these different parties settled, oral testimony was also admissible for the reasons adduced in the

case of *Cureton* vs. *Turnbull*. After having taken a view of the whole, there remains no doubt in our minds that the place where T. Thompson lived was upon the lowermost five arpens of the patent, and that the other half of his land below was on Rusty's grant, for which Wm. Miller Thompson's executor obtained a certificate of confirmation from the land office—that the peach tree marked K is the lower boundary of Rusty's grant of five arpens front—and that Myer's patent begin immediately above these five arpens.

We are satisfied that whether or not there has been any settlement in the upper part of the patent, possession and settlement in the lower part was sufficient. It is surely not necessary to refer to authorities for the purpose of shewing that corporal possession of a part, with title to the whole, is possession of the whole.

So much, therefore, of the present demand, as is directed against the defendant Marshall, must be dismissed.

As to Julien Deshautel's title to the land adjoining Myer's patent above on the left bank of bayou Bœuf, we are bound to say that he has not not made it good.

The certicate of the commissioners, which he exhibit, is founded on a *requête*, in which he petitions for land on the side of the bayou, opposite to his

West'n District. *September*, 1820.

DONEGAN'S heirs vs. MARTINEAU & al

settlement—and it having been proved that he was at that time settled on the left bank, his claim calls for land on the right shore. We must therefore decide that the title, which he produces, does not apply to the land now in dispute. Neither do we find his plea of prescription maintainable—first, because his possession without title should have lasted thirty years—and secondly, because the evidence does not even shew any acts which may be considered as amounting to possession.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be reversed—and proceeding to give such judgment as we think ought to have been rendered below—we do further adjude and decree that such part of the claim of the plaintiffs as is directed against the defendant Roger B. Marshall be dismissed—and that the plaintiffs be put in possession only of so much of the land called for by their title as will be found out of the limits of Myer's patent, after that patent shall have been so surveyed as to have its upper limit twenty arpens above the peach tree marked E on plot K filed in the record of this suit—it is further adjudged and decreed that the plaintiffs pay one half of the costs in both courts, and Julien Deshautel the other half.

HICKS & WIFE vs. *MARTIN.*

APPEAL from the court of the sixth district.

Where one party charges another with a culpable omission or breach of duty, the person who makes the charge is bound to prove it, though it may involve a negative

DERBIGNY, J. delivered the opinion of the court. The plaintiffs, citizens of Tennessee, claim a negro woman slave, named Polly, now in the possession of the defendant, alleging that she is part of the estate left by the late Manson Hardaway of Virginia, of whom Elizabeth Hicks, one of the plaintiffs, is the only child and heir at law—that the said slave, who had been assigned as dower to the widow of the said Hardaway, was, contrary to the provisions of the laws of Virginia, removed from that state by the said widow, who thereby forfeited her right of dower upon her—and that by reason thereof Elizabeth Hicks, as reversioner, has become the absolute owner of that property.

The answer of the defendant denies the facts alleged, and further pleads title in himself.

Several questions have been raised in this case, part of which, the view, which we have taken of the subject, precludes the necessity of examining. We will not enquire whether a state can or ought to enforce the laws of another in matters of forfeiture; nor whether, under the laws of Virginia, parol evidence of an assignment of dower on slaves can be deemed sufficient—but taking all that for granted, we will enquire whether enough has been proved

West'n District. *September*, 1820.

HICKS & WIFE vs. MARTIN.

by the plaintiffs, to establish the forfeiture on which they rely.

By the same laws of Virginia, introduced in evidence by the consent of parties, forfeiture, in a case like this, takes place when the the widow removes the slave, *without the consent of the reversioner.* The removal is proved—but the want of consent is not. Now, although, it be a general rule that the negative is not to be proved, that rule does apply to a case like the present. "Where one party charges another with a culpable decision or breach of duty, the person who claims the damage, is bound to prove it, though it may involve a negative—for, it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary is proved." *Philips Evidence, chap. 7, sect. 4,* and the authorities to which he refers. Here, no attempt has been made to show the *culpable omission*, which alone, could cause the forfeiture, and create the right, on which the petitioners claim. They have been even so cautious not to throw any light on that part of the subject, that they have given no date, nor any other clue, from which the relative situation of Elizabeth Hicks and the widow of Martin Hardaway can be ascertained. Enough, however, is found in the testimony taken in Tennessee, to inform us that the widow of M. Hardaway is no other than the plaintiff Elizabeth Hicks's

own mother, who brought her to Tennessee in the year 1807, shortly after her father's death—and to make it highly presumable that Elizabeth Hicks was then a minor, who had no consent to give or to refuse, but through her mother and guardian, the very person who had that consent to ask.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Wilson* for the defendant.

BERNARD vs. *SHAW & AL.*

APPEAL from the court of the fifth district.

Altho' a deed be void, as to the transfer of the vendor's right, it may be resorted to, as evidence of the quantity of land, which the apparent vendee, with the consent of the owner took possession of, against a stranger, without any color of title.

Brent, for the plaintiff. This suit is brought to recover the possession of a tract of land consisting of thirty-three arpents front, with ordinary depth, upon both sides of the bayou Têche, in the full enjoyment of which the petitioner is disturbed by the defendants.

Three of the defendants, viz: Joseph Prévost, John Shaw and Bartholemew Castillon, filed their answers and denied the facts in the petition.

At the trial, the defendant Joseph Prévost, came into court in person and acknowleged the right of

West'n District. *September*, 1820.

BERNARD vs. SHAW & AL.

the petitioner, to recover *possession* against him, and judgment was accordingly rendered.

The other defendants, Shaw and Castillon, resisted the claim of the petitioner, and the court below gave judgment in their favour; from which judgment this appeal is taken.

Before I enter into the argument upon the testimony, I will call the attention of the court to the law which must govern this case.

It suffices of a *year's possession*, if it has been peaceable and uninterrupted, to make the possessor be considered as a *just possessor* and *even as a master*, until the true owner makes out his title. *Civil Code*, 478, *art.* 23.

It will be an easy task to shew from the testimony, that the present petitioner was in peaceable possession of the land for more than the time required.

Frederick Pellerin proves that since 1804, to the present day, a period of upwards of 15 *years*, the petitioner has always *peaceably possessed* the land by himself and by his agents *put upon it;* that the petitioner went to France sometime ago, and during his absence, always *possessed it*, by persons whom he put upon it, and that he returned from France the last of 1815, and *since then has lived upon the land.*

Agricole Fusilier, swore that *two* years previous

to October 1819, the petitioner cut a road opposite to where the defendant Castillon's house *now stands* through the woods, and has always used it since, and that the petitioner, "who lives not far from the wood, has always cut and used the wood on the land," where he cut the road, and that the same has always been considered as the petitioner's land.

Here, then is clear positive proof, not only of *possession one year*, but more than 15 years, which must entitle the petitioner to recover the *possession of the land*, if the testimony is not contradicted by the defendants—let us examine their testimony.

Godefroy Verrette was sworn on the part of the defendant. His testimony, so far from destroying the evidence on the part of the petititioner, strengthens it. He states that the defendant never entered on the land until February 1818—that he then cleared away *two thirds only of an arpent* and *began to put up* a cabin, but did not *cover it* or *mud it* or *inclose it*, and that the defendant never *lived there* and *never had put a family there*, never had any *household* or *kitchen furniture there*, and that he never *moved upon the land*, until about *two or three months before he gave his testimony*, which was about the time *this suit was brought*. This witness does not prove that the defendant *never possessed* the land more than *a week* or two before the suit was commenced. He says to be sure that about

West'n District, September 1820.

BERNARD vs. SHAW & AL.

eighteen months, before the present suit commenced, the defendant *trespassed* upon the petitioner's land in February 1818, by making a *little clearing* and *putting up the frame of a house*, but that he *left it* and never *returned to it* or *moved* upon the land, until about *three months before the time he was giving in his testimony*, which was about the time *this suit first commenced.* So that this testimony, so far from *destroying* the *testimony of the petitioner*, *establishes the fact* that the defendant *did not possess the land*, that he *never possessed it a sufficient time*, to contend against the petitioner's possession. The court can consider the entry of the defendant, in none other light than that of a *trespass.* He entered upon the land, remained a month or so, then left it, remained *away more than a year*, and returned only about *the time this suit was commenced*, when he *first shewed* a determination to *take possession of the land:* upon which the petitioner sued him.

Pierre Bonvillain, the other witness, for the defendant, proves nearly the same thing as Verrette, except he says expressly, that the defendant about *two years ago began to put his cabin*, that he *then* put up the *posts* and rafts and *left it*, until about two or three months before he gave his testimony.

The court will see by this testimony, offered by the defendants, that they *never possessed the land*

for *a year*, *peaceably* and *uninterruptedly*, as the law requires—on the contrary, they never possessed with an avowed intention of exercising ownerships, by *residing upon it* or *cultivating it*, until about the time this suit was brought, when they were *immediately sued*. How could the petitioner have acted differently from what he has, to secure his right? He would have done wrong to have sued, when they first entered upon his land: for, they soon left it, and he had every reason to believe never would return; and they left it, as this court will reasonably presume from the opposition of the petitioner to their settling there. After they had left it we see no act of ownership over it. They did not pay taxes for it, they did nothing by which it could be supposed they ever intended to return to it, and as soon as they did, the petitioner, who from the testimony of Frederick Pellerin and Agricole Fusilier, had peaceably and uninterruptedly possessed it since 1804, immediately commenced his suit.

But, again the law is, "if two persons claim the possession of property in dispute," *the one*, who had been in possession of the property for the *spuce of a year*, *before* the disturbance given him by *the other*, will be maintained therein. *Civ. Code*, 475, *article* 25.

Now, it is proven by the petitioner's witnesses, that he had been *in possession of the land* in dis-

West'n District. *September*, 1820.

BERNARD vs. SHAW & AL.

pute since 1804, and that since 1815, *he had resided upon it*—so that he had possessed it a year, previous to the *disturbance* complained of, and ought to recover it from the defendant.

How ought property to be possessed, in order to entitle the possessor to any kind of prescription? And, is not *a year's possession* under our laws, *a prescription of a year*, and does not the *prescription of a year*, require the same kind of possession as that of *ten years?* It does. What says the law? "Prescription requires a *continued*, *uninterrupted*, *peaceable*, *public* and *unequivocal possession.*" *Civil Code*, 480, *art.* 28.

Here, if the possession was doubtful, the petitioner has the best *probable title*—for it is proven that since 1804, he has been in possession.

To prove this title, the defendant offered in evidence *a bill of sale*, passed before the regular authority of Attakapas, on the 1st of March 1804, by the Chètémacha Indians to the petitioner, for the land now claimed, to shew that since then he had possessed in *good faith* and in virtue of a *just title*, which the court refused to read and *rejected* it, to which a bill of exceptions was taken.

The court, certainly, erred in rejecting the petitioner's deed, under which he had always held, and *possessed the land in good faith*, for *upwards of fifteen years.*

The law says, "a man who becomes possessed of an immoveable estate *fairly* and *honestly* and by *virtue of a just title*, may prescribe for the same, after the *expiration of ten years*, &c. *Civ. Code*, 486, *art.* 67.

"*A just title* is one by virtue of which, property *may* be transferred; *such as a sale*, though such title *may not give a right to the estate.*" *Civ. Code*, 488, *art.* 68.

I will, first, shew that the petitioner, in the words of the law, became possessed of the land, *fairly* and *honestly*, and I will then shew that his title was *a just one:* and if I shew these two things, this court must say that the court below erred and the petitioner will have that justice done *here*, he ought to have received *below.*

I. The petitioner became possessed of the land *fairly* and *honestly*, because he used no fraud in purchasing the same. It was a *fair honest purchase*, by which the *vendors* to whom the land belonged. as will appear by a reference to *Galvez's order*, in the record, *page* 16 & 8, sold the land to the petitioner for a *valuable* and, at *that time*, *high consideration.*

The transaction was a *fair one*, because not *forbidden, at that time*, by any law of the country; but on the contrary such sales were daily made.

This country was possessed by the United States,

West'n District
September, 1820.

BERNARD
vs.
SHAW & AL.

in the *latter part* of 1803. *This sale* was made in the *beginning* of 1804, on the 1st of March, whilst the *laws of Spain* relative to such sales *were in force here*, and *before* the *law of congress, prohibiting such sales* by Indians, was *extended* to Louisianana.

By the *laws of Spai* , in force in Louisiana, such sale was legal, and the *laws of Spain remained in force*, until altered by the *laws of Congress*. In the case of *Seville* vs. *Chretien*, 5 *Martin*, 284, (near the middle of the page) this court has decided "that, in case of the cession of any part of the dominions of one sovereign power to another, the inhabitants, of the part ceded, retain their ancient municipal regulations, until they are abrogated by some act of the new sovereign." Then, if such be the principle, and if it was *legal under the Spanish* government to make such sales, it was legal until the Spanish custom or law was *abrogated*, which was *not done* at the date of the sale 1st March 1804. The *first law* of Congress, which extended *any of the laws* of the United States to the *territory* of Orleans, was passed upon the 26th March 1804. *Martin's Dig.* 148, *sec.* 7, § 156, *sec.* 11, subsequent to the date of the petitioner's deed, which was *a fair* and *legal deed when made*, and the petitioner having obtained it *legally*, obtained it *fairly* and *honestly*.

The next part of my argument will be taken up, in shewing this court that the sale to the petitioner *was a just one*, and such as the petitioner is entitled to prescribe under.

II. *A just title*, is described by the law to which I have before referred, to be *one by which property may be transferred*, though *such title may not give a right* to the property. The same definition is given by Pothier. *Pothier's Prescription, n.* 57, 58.

I will then *ask* the court, if the deed from the *Indians* to the petitioner for the land in dispute, is a sale in usual form. *Immaterial whether it transferred the right to the land*, is it not within the *true definition* and *meaning* of what the law defines *just title?* It is admitted in the bill of exceptions in record *p.* 6, that the said deed was for the *very land in dispute*, and I beg the court to refer to it, accompanying the bill of exceptions and see if it is not a *good sale* cloathed with *every formality* and what the law calls a *just title*. If it be so, the court below *erred* in its rejection, and the petitioner can avail himself of the ten years possession in *good faith* under *that title*, so as to recover from the defendants, *who have no title at all to the land*. He, certainly, possessed the land in *good faith;* for the laws of the country approved his *buying it* when

West'n District. *September*, 1820.

BERNARD vs. SHAW & AL.

he did, and he confidently expects that the government of the United States will approve the purchase.

The ground upon which the court below refused the introduction of the deed of March 1804, was that the deed did *not transfer the property* to the petitioner, but that *it yet belonged to the Indians.* With due respect to that court, I think the idea a singular one in an action like the present. If such be the law, the *Indians might take advantage of it*, but most certainly the *defendant cannot.* Such has been the decision of this court in the case of *Martin* vs. *Johnson* and others, 5 *Martin's Rep.* 661, where the court says "The result (of the sale from the Indians being contrary to law) would be that the Indians have not been legally divested of their title, and could perhaps take advantage of it—but until then, the defendants hold in their right, and cannot be disturbed by others." So is the case with the petitioner, he *holds in the right of the Indians* and cannot be disturbed by the defendants.

From a full view of this part of the argument the court must be satisfied that the deed ought to have been received, and if it had that the petitioner would certainly have recovered of the defendants.

It would at least have had this effect to shew that the petitioner, *had the most probable title*, which, would have entitled him to recover the land, from

the defendants according to the law as written in *Civil Code*, 380, *art.* 28.

The petitioner also offered *in evidence* proof of the *payment of taxes to the United States*, and *this state*, and the *parish* in which the land lies, yearly from the *year* 1807 to the trial, to shew that the said land had, during that time, been *taxed as the petitioner's* and *possessed* by him—and the court refused the same, to which a *bill of exceptions* was also taken.

The proof of paying taxes ought to have been received. It shewed the *open*, *continual* and *unequivocal* possession of the petitioner—the possession *animo domini*. It is one of the *many kinds* of testimony admitted to *prove possession*. *Pothier, Prescription, n.* 176.

Brownson for the defendants. In replying to the arguments of the plaintiff's counsel in this case, it is necessary, in the first place, to remark, that with respect to John Shaw, one of the defendants, there is no statement of facts. The gentleman, who was counsel for Castillon and Prevost only, and not for Shaw, as will appear by the answers filed, could not bind the latter to any statement of facts. This objection is material, because, besides the various difficulties to which the plaintiff's pretentions are liable under this statement, it does not certify the

West'n District. September, 1820.

BERNARD vs. SHAW & AL.

facts truly as it respects Shaw. Indeed, it was understood, at the trial, that the idea of a judgment against him, was abandoned, and for that reason, no evidence for or against him was taken. This does not perhaps conclusively appear from the transcript. But the court will observe that in the statement of facts, mention is always made of the *defendant*, not of the *defendants*. The reference too, where a pronoun is used, is always in the singular number. Thus *he had not his* family with *him*. But extracts are unnecessary. The court will see the whole statement of facts. If the gentleman signed as attorney for *defendants*, the reply is, that the answer was probably filed, before Joseph Prevost, one of the defendants, consented to confess judgment, and that the answer is itself stiled the "separate answer of Joseph Prevost and Bartholemew Castillon." When afterwards, in signing the statement of facts, the gentleman attaches to his name the expression, "attorney for defendants," he must be presumed to mean attorney for two defendants, whose answer he had filed. Perhaps it may be irregular to state, as it does not appear from the transcript, that John Shaw was made a defendant by mistake, from the resemblance between his name and Jones Shaw who is said to be within the limits claimed by the plaintiff. But if I am incorrect in this suggestion, the plaintiff's counsel can set me

right. The only questions therefore, which are before the court, as it respects John Shaw, are those, which arise out of the rejection of the deed, as evidence, and of the proof of the payment of taxes, or, in other words, those which are connected with the two bills of exceptions. Should these two opinions of the judge below be overruled, it is respectfully suggested, that the only thing the court *can do*, as against Shaw, would be to send the cause back for trial, with orders to receive the evidence offered. But it appears to me that the opinions of the judge can be supported, and that they are sound law. The plaintiff in his petition has called this an *action* of *possession*. He has not thought proper however, to rely simply upon *possession* without exhibiting his title. The case therefore did not present a mere naked question of *possession*, but a mixed one, of possession and title, and if it clearly appeared from the petitioner's own shewing, that he had no title, the court could not give him the possession, which he asked. The *Civil Code*, 478, *art.* 23 says, in speaking of possession, that "the natural connection, which is between the *possession* and the *property makes the law to presume*, that they are joined in the person of the possessor, and *until it be proved* that the possessor is not the right owner, the law will have him, by the same effect of his possession, to be *considered as such*." This article,

West'n District
September, 1820.

BERNARD
vs.
SHAW & AL.

it is true, generally makes the possessor *presumed* to be the owner, but still it is a *mere presumption*, liable to be corrected by actual proof—and that *presumption*, let it be observed, is only to continue "*until it be proved* that the possessor of such a piece of property, is also the owner of it by virtue of such a title, and if it is found on examination to be no title at all, is not the *presumption* corrected by a more complete and perfect knowlege of the fact? And would the court, after having this knowlege brought home to them, still persist in comitting an injury by putting a person, clearly without title, into possession? Surely not. The case of *Meeker's ass.* vs. *Williamson & al. sindics*, 4 *Martin*, 626, has settled this question. "But when the plaintiff puts at issue his right of possessing, as when he alleges that he is owner, and presents his title as the evidence of his possession, the simple fact of possessing is no longer the only question. The defendant is then allowed to dispute the validity of that title, and is maintained in the actual enjoyment of the premises, if the plaintiff fails to make his title good." In this cause the plaintiff has put at issue his title, and offered the rejected deed as evidence of that title and of possession. But the court below, being of opinion that it was neither evidence of title nor possession, refused to admit it, to which opinion the plaintiff excepted. It is

clear that the deed could not be evidence of *possession*, unless at the same time it were evidence of *title*. Possession is divided into two kinds. natural and civil, the one is actual, the other legal. *Possidere corpore* and *possidere jure*. The one is accomplished by entering into actual possession of the whole, the other by taking actual possession of part with intention to possess the whole, which intention is inferable from some *legal* or *apparently legal* title to the whole. It is proper then to enquire, whether the deed in question furnishes such an *apparently legal title* as to be the foundation for civil possession. It will not be pretended, that there was any actual possession, by the plaintiff, of the land where either of the defendants are located, that is, no part of it was ever inclosed, or possessed by any visible act of possession, except the trifling establishment, of which the evidence speaks, and the alleged purchase from the Indians. Had the defendants either of them intruded upon the the actual possession of the plaintiff, had they broken into his inclosure or committed any other violence upon his actual possessions, I will not undertake to say that the court might not have granted some relief. But as they have not done this, the only question is, whether the plaintiff has such a title to the whole tract purchased from the Indians, as to justify the extention of an actual possession of part to a civil

West'n District. *September*, 1820

BERNARD *vs.* SHAW & AL.

possession of the whole. I think clearly he has not. This deed purports to have been executed by one Baptiste, calling himself chief of the Chitimacha Indians. It does not however appear, that the alienation was made with the permission or approbation of either of the Spanish government or of the Chitimachas themselves—both of which it is contended were necessary to the validity of the sale.

It is contended that the Indian tribe itself could not, even in its collective capacity, have alienated this land without the consent of the government, who had at the time dominion of the country. It is said in 5 *Mart. Rep.* 658, that "the king of Spain, in taking possession of his dominions in America, disregarded the rights of the original lords of the soil, and declared himself sovereign of the country." Again it is said, *ibd.* 660, "by the laws of the Indies 6, 1, 27, however, it is recognised that Indians can hold land, as well as other people may, that they can alienate it, with permission of the government." The counsel for the defendants has not the means of refering to the laws here quoted. But from the expression used, it is inferred that the permission of government was essential to give validity to the act of alienation. It seems to have been the policy hitherto pursued by all the civilized nations, who have had Indians located within their jurisdictional limits, to treat them

as persons under tutelage, as persons *inopes concilii*. Thus, the United States appoint agents to regulate commerce between them and the whites, and strictly prohibit all trafic carried on in any other way. By the act of March 30, 1802, *n.* 22, *sect.* 12, *Graydon's Dig.* 231, it is declared, that "no purchase, grant, lease or other conveyance of land, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the U. States, shall be of any validity in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution," and the same section proceeds to make it a misdemeanor in any unauthorised person to attempt to negotiate any treaty for lands with Indians. In the state of New-York, we find the same regulations adopted, with respect to Indians within the limits of that state—And many decisions have taken place there, concerning the effect, which these regulations have upon rights, acquired under sales from them. In 7 *Johnson*, 290, when a patent had been issued to an Indian, "granting and confirming unto him" the lot in question, "to have and to hold unto him, his heirs and assigns as a good and indefeasible estate of inheritance forever," it was decided that the Indian, tho' he held the land in his individual right, and tho' the highest species of estate known to the laws there, had been granted to him, yet that he

West'n District. *September*, 1820.

BERNARD vs. SHAW & AL.

could not alienate without permission of the government. *Judge Kent* remarks, 296, that "the regulations in the act of 1801, all shew the sense of the legislature, that an Indian, in his individual capacity, is, in a great degree, *inops concilii*, and unfit to make contracts, unless with the consent and under the protection of a civil magistrate. The law not only protects Indians from any suit upon their contracts, but it declares specially that all alienations of land by the Brothertown and New Stockbridge Indians are *void*. These are just and human guards against the imposition and frauds, which that unfortunate people have not the power to withstand; *The same provisions (continues the judge) prevail in the Spanish colonies; none of the Indians within the Spanish dominions can dispose of their real property without the intervention of a magistrate*"---In 9 *Johnson's Rep.* 362, where a person, by a written license from the Peace makers of the Stockbridge Indians, granted pursuant to a vote of the nation, entered and cut down trees, of which he made shingles, it was decided that he was a trespasser, and could not therefore recover the shingles against a third person, who had taken and converted them to his own use, and the court, in giving their opinion, observe, "that it was the wise policy of the statute to interdict all individual whites, from any negotiation, or any contract with the Indians, in respect to their lands, or

any interest therein—such a complete and total interdict was indispensible to save the Indians from falling victims to their own weakness, and to the intelligence, and sometimes the cupidity of the whites." I think therefore, I cannot be mistaken in supposing, that a sale of real property from a tribe of Indians, tho' acting in their collective or national capacity, would be a mere nullity without the approbation of the government, within whose jurisdictional limits, they were at the time situated. This court has implied that such approbation would be necessary in saying that the Indians "can alienate with permission of government." *Judge Kent* has said that the same provisions prevail in the Spanish colonies as in the state of New-York—that "none of the Indians, within the *Spanish dominions*, can dispose of their real property without the intervention of a magistrate." We see that the United States have adopted similar regulations, in regard to the Indians, and it is believed, that the English government has not been behind other nations in the same policy—indeed, this sort of control seems necessarily to result from the pretentions, which these nations have assumed—and, tho' *one* object in these regulations has probably been *to protect the Indians against their own weakness*, yet these nations have probably at the same time had *another object* in view, and that is, t o preserve the Indian lands from

West'n District September, 1820.

BERNARD vs. SHAW & AL.

alienation as a property, in which they themselves had an interest. But the opinion of this court is quoted in the case of *Seville* vs. *Chretien*, 5 *Martin*, 284, where it is said "to be an incontrovertible principle of the laws of nations, that in cases of the cession of any part of the dominions of one sovereign power to another, the inhabitants of the part ceded retain their ancient municipal regulations, until they are abrogated by some act of their new sovereign." Admitting this prohibition to sell without the permission of government, to be a municipal regulation, how could the *necessity* for that *permission* cease, on the change of government without some *act*, implying a change of regulations? Was any such change ever made? On the contrary, the act of 26th March 1804, expressly extends the laws of the United States, regulating the intercourse with the Indians, to Louisiana, thereby *confirming* instead of *changing* the ancient regulations on this subject, and requiring among other things the express consent of the government, as an indispensible requisite to the validity of a sale from the Indians. But is it clear, that the right of tutelage over the Indian nations is a municipal regulation? Is it not rather a *political right* than a municipal regulation? Is it not one of those incidents to sovereignty, which necessarily accompanies it, wherever it goes? And if the sovereign power passes

from one nation to another, does not this right pass with it, and vest "*eo instanti*" in the new sovereign? Perhaps the act of congress, extending the laws of the United States to Louisiana, was necessary, so far as to give effect to the regulations prescribing the manner of enforcing them. But, was it necessary for the acquirement of the *right in question?* Did it vest any new *right* in the United States over the Indians? It appears to me that it did not. It appears to me, that as civilized nations have uniformly disregarded the rights of the "original lords of the soil," have uniformly declared themselves sovereigns of the countries, over which they have extended their dominions, have uniformly imposed restraints upon alienations by the Indians, and *assumed* a *right* to grant or withold their approbation of such acts, and have, in most, if not, all cases, declared that such acts shall be considered void without such approbation, it appears to me, that the *right* in *question*, has now grown into a necessary incident of sovereignty, and is recognized in the national law of our times.

But this deed is deemed, if possible, more fatally defective on the second ground; and that is that it does not appear to have been executed with the knowlege or approbation of the Chitimachas themselves. It seems to have been the single act of one famous Baptiste, called an Indian chief. It is he

West'n District. *September*, 1820.

BERNARD vs. SHAW & AL.

alone, that undertakes to sell out the whole possessions of the tribe. It is he alone, who consents to the terms of the sale. It is he alone, who receives the consideration, *if any consideration was given.* All these solemn acts, so important in the humble concerns of an Indian tribe, are confided solely to the wisdom, discussion and honesty of perhaps a drunken savage, who in a fit of intoxication would not scruple to sell his wife and children. It is believed not to be the practice among any of the Indian nations to confer such absolute and despotic powers upon their chiefs. It is thought to be the general custom of these people, even when they are not under the tutelage of some civilized nation, to act in council upon matters of such moment as the alienation of their territory. The plaintiff's counsel has taken much pains to shew, that the transaction was a fair and *bona fide* one. But how does it appear to have been fair? What proofs have been adduced of the fairness of the transaction? Nothing but the deed. And what does the deed prove? Why it proves itself. It proves that such a deed was given, and it proves nothing else. Whether the consideration, expressed in it, was ever given, we know not. Whether the Indian was drunk or sober, when he made his mark, we are equally uninformed. Whether he was wheedled into the measure by constant and repeated solicitation, or whe-

ther he sought the bargain himself, are facts, of which, we are also ignorant. But it is said to be in usual form—so also in all probability would be a deed taken from a lunatic, from a minor under puberty, or from any other person, deemed in law incompetent to make contract. If a tutor, without pursuing the necessary formalities, should attempt to sell the real property of his ward, tho' the deed might be in perfect form in every other respect, yet if the fact, that it was the property of his ward, should appear from the instrument itself, it would forever stamp it with nullity, and no one could prescribe under it, not even in thirty years—so also, it appears from the face of this deed, that a single Indian, without permission of the government, or of the tribe to which he belongs, has attempted to sell the possessions of the tribe. The illegality of the transaction is too glaring not to strike every one on the very production of the deed. It is not surely such a deed, as can lay the foundation of any *real* or *apparent* title. It can not assist prescription. On the contrary, it seems to me, it would stop it. There is no resemblance between this case and the one of *Martin* vs. *Johnson & al.* quoted by the plaintiff's counsel. In that case, a sale had been made by the Indians in their collective capacity, as a tribe, not by an individual Indian. The approbation of the government had been expressly given. There was

West'n District. September, 1820

BERNARD vs. SHAW & AL.

a *bona fide* sale, and nothing was deficient but a matter of form as to the manner of making the sale, that is, it was private, and the laws required that the property of Indians should be sold at auction. But every substantial requisite having been complied with, the rights of the Indians having been duly protected by the government, in the approbation, which they gave to the sale, and the title matured and completed by a certificate from the U. States, the court could not do otherwise than decide, that the mere formal objection, as to the manner in which a sale, so long acquiesced in, had been originally made, should not render totally void proceedings of such high solemnity. The present is however, a very different case. A large tract of land is assigned to a whole tribe of Indians by the government. The commandant is strictly enjoined as appears from the order of Galvez, the governor, to maintain them in possession, and all persons are prohibited from intruding upon them. The petitioner however, in violation of this order, has gone into the land, procured a deed from a single Indian, calling himself chief, without the consent of the tribe, either constructive or real, or the approbation of the government, and now alleges this trespass and intrusion as the foundation of a claim, and pretends that a deed thus obtained communicated to him a title, under which he can prescribe.

It is conceived, that there can be no doubt, that the court below decided correctly, in rejecting the deed.

As to the proof of having paid taxes, it would only have been good to establish civil possession: as there can be no civil possession without title, and the court had rejected the evidence of such a title, the proof offered became irrelevant and unnecessary. I leave this case with the court, feeling confident that the opinions given below will be sustained.

Brent, in reply. I replying to the arguments of the defendants' counsel, I shall be very short, for I do not conceive, that his reasoning has shaken, in the court, the position I have taken.

His statement relative to John Shaw is correct—and I do not know how his name was inserted in the judgment of the court, as the suit was dismissed as against him. I only used his name with Castillon's, as I found them compled together in the judgment.

The defendant says there was no *actual* possession of the land, by the petitioner—by a reference to the statement of facts it will be seen that there was.

The whole argument of the defendant's counsel is built upon the title to the petitioner, from the

West'n District. September, 1820

BERNARD vs SHAW & AL.

Indians, being *illegal.* I think I have shewn in the *opening* of this case, that, even supposing the title to be *illegal*, it does not affect the petitioner's right to recover, through ten years prescription under a *just title*, and I have only to refer the court to the authority I before quoted to shew that it was a *just title*—and the defendants do not deny it in their argument, for they have not attempted to shew the contrary. If then the title was a *just title*, the petitioner can prescribe under it.

It has been contended that this sale is an *illegal* one, because it was not approved by the government. It is admitted that, until the sale was approved by government, it was an *incomplete* sale, but it is contended, by the petitioner, that the *sale in itself* was a *legal one*, a necessary *step* towards the approbation, and that whether government will *now* approve or *not*, is a question between the government of the United States and the petitioner, but, that the sale being a legal one, *a just title*, the petitioner can prescribe under it against the defendants—nor does the authority referred to by the defendants from *Martin's Reports*, contradict this principle. The supreme court makes a distinction between a *void* and *voidable sale.* In this case. the sale may be voidable, but it certainly was not void. The *laws* and *customs* of Louisiana, *at the time* it was made, *authorised* such sales : for the

act of congress forbidding them was not extended to Louisiana, as I have shewn before, until after *this sale was made*—and this sale being only a voidable sale, (if it be voidable at all) the authority is applicable and it is enbraced in the principles referred to before, as laid down in the case of *Martin* vs. *Johnson & al.* 5 *Martin*, 661.

MARTIN, J. delivered the opinion of the court. The plaintiff stated that he is the owner of a tract of land of thirty-three arpens in front, on both sides of the bayou Têche with the ordinary depth—that he has peaceably and uninterruptedly possessed it for upwards of a year and a day, and ten years before the institution of this suit, with a good and just title, and always paid the taxes therefor: notwithstanding which, a few months back, the defendants have entered on the said land and disturb and molest him in his possession: and, if the court deem it necessary, in this *action for possession*, to exhibit titles, he purchassed the premises, in the year 1804, from the Chitimachas Indians, who, in the following year, confirmed his title—that the land was, before such a sale the property of the said Indians and so recognized by the government of the province of Louisiana. He prayed to be restored to his possession and for general relief.

Shaw pleaded the general issue and that the pos-

West'n District. *September*, 1820.

BERNARD vs. SHAW & AL.

session, set up by the plaintiff, is a trespass against the Chitimachas Indians and the pretended sale is illegal and void.

Prevost and Castillon pleaded the general issue, and that they have a good title to the premises, under a lease from the Chitimachas Indians to J. B. Bourgeois.

At the trial the plaintiff offered in evidence a deed from the Chitimachas, dated March 1st 1804, for the premises, to the plaintiff, for the purpose of proving his possession, the land being a part of the tract mentioned in *Galvez's* order dated September 14, 1777. The court refusing to receive the said deed in evidence, the plaintiff's counsel took his bill of exceptions.

He also offered the receipts of the collectors of taxes for the United States, the state and parish, for the taxes due or the premises from 1807 to 1819, inclusive, to shew that the land had always been considered as his, and to prove possession. The court refusing to receive these receipts in evidence, he took a bill of exceptions.

The court gave judgment that the defendant Prevost having, in open court, acknowleged the right of the plaintiff—the latter recover the land and costs against the former, and, the plaintiff having failed to establish his right of possession against the other

defendants, that there be judgment for the latter. The plaintiff appealed.

The statement of facts shews that the plaintiff gave in evidence an order of governor Galvez of September 14, 1777, forbidding the inhabitants, in any manner, to molest the Chitimachas Indians of Grand Terre, in the establishment which they occupy and ordering the commandant to see that they be not molested and maintain them in the possession of their land.

Fusilier deposed that, two years ago, the plaintiff cut a road through the woods, opposite to the house, in which the defendant Castillon now lives and has ever since used it. That the petitioner, who now lives not far from the road, has always cut and used the wood upon the land, where he cut the road, and which is that which he always claimed as his own and was so considered: the defendant's cabin was on the bank of the bayou Têche, and the road began behind it and about ten arpents from it.

Pellerin deposed that for many years, he believes since 1804, the plaintiff has been considered as the owner and possessor of the land in dispute. That some time in 1805, the plaintiff placed an Indian named Penigou, in a cabin to keep possession of the land for him, which cabin was not more than an arpent, from the place on which the defendant now lives. As well as he recollects, it was several years

West'n District. September, 1820.

BERNARD vs. SHAW & AL.

since he saw what he ever told was the defendant's cabin. He believes the defendant never finished it nor lived in it, until within a few months. Penigou died about ten months ago. The plaintiff went to France in 1806 and returned in the latter part of 1815, or the first of 1816, and has ever since lived on the land he bought from the Indians, part of which is the land in dispute.

Verret, on the part of the defendants, deposed that in February 1818, the defendant for the first time went upon the land, made a clearing of two thirds of an arpent in front and one in depth, and began to built a cabin. He placed the posts, raised the roof and lathed it, but did not cover it, nor mud or inclose the house with any thing, nor made any door or windows. The defendant lived at the distance of about ten arpents, and to his knowlege the defendant did not live there. He went often to see them at work and never saw any kitchen or house furniture, and no inclosure or fence were put up. The defendant moved upon the land about two or three months ago, that is into the cabin, which he had began; he finished it and now lives in it.

Bonvillain deposed that the cabin of Penigou, the Indian, was about ten arpents from the place on which the defendant now lives—that he lives in a cabin, which he began about two years ago, and

which he finished and moved into about two or three months ago. Two years ago the defendant began to build the cabin, put up the posts and rafters and then left it, until he returned about two or three months ago.

It is admitted that the statement of facts does not relate to the defendant Shaw, as it is not subscribed by him nor his attorney, and does not appear to have been made with the consent of either of them, and the plaintiff's counsel admits he considered the suit as dismissed, in regard to this defendant.

The action is clearly a possessory one only, altho' the plaintiff has made a mention of his title. In suffices, therefore, that he should shew a possession for a year and a day, as the defendant has neither any title nor possessession during that time.

This he has done by the testimony of Fusilier and Pellerin, which shews that he took possession of a quantity of land (which includes the premises in dispute) under a deed from a chief of the Chitimachas Indians. Had the witnesses declared that the plaintiff possessed the land, under the oral permission of the owner—this would have sufficed. Now notwithstanding the deed may be void, as to the tranfer of the vendor's right, it may be resorted to as evidence of the quantity of land to which the apparent vendee, with the consent of the owner

West'n District. *September*, 1820.

BERNARD vs. SHAW & AL.

took possession of, against a stranger, without the least color of title.

The title of the Chitimachas Indians must be admitted, since both the plaintiff and defendants claim under it.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff do recover from the defendant the possession of the premises, with costs in both courts.

WILLIAMS vs. *HALL.*

APPEAL from the court of the sixth district.

If a tract of 200 arpents be sold, to begin on the bayou and to run down & back for the quantity, the grantee must have a front on the bayou as with the depth of the tract will make 200 arpents.

MATHEWS, J. delivered the opinion of the court. This action was commenced to obtain the division of a tract of land, which was held in common by the parties. It is said to contain four hundred arpents, one half of which the defendant holds under a title derived from the grantee, of a date anterior to that of the deed, under which the plaintiff claims the other half. In pursuance to an order of the district court, the land has been surveyed and a plat, representing its figure and limits, has been returned by the surveyor, and comes up with the record.

The deed, under which the defendant claims, calls

for a beginning, at the upper end of the plantation on which the family of the grantee resided. It purports to convey two hundred arpents, to be ascertained by running down the bayou Robert, on which the land is situated, and back for quantity.

We are of opinion that the land, called for by this deed, must in the division of the disputed property, be first satisfied, and the twenty arpents of face, laid off for the defendant accordingly, and the balance of the whole tract of four hundred arpents for the plaintiff.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the land in dispute, be divided, between the plaintiff and defendant, by beginning on the bayou Robert, at the upper end of the clearing made by Wade, the grantee, and running down the said bayou, a front sufficient to make two hundred arpents, with a depth as delineated in the plat of survey, which comes up with the record, to be assigned to the defendant and appellee and that the balance of said tract of four hundred arpents, be laid off for and assigned to the plaintiff and appellant: and that the costs be divided between the parties.

Baldwin for the plaintiff, *Wilson* for the defendant.

West'n District. *September*, 1829.

ROGERS' HEIRS vs. BYNUM.

ROGERS' HEIRS vs. *BYNUM.*

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. The error complained of, in the judgment of the district court, is that a compensation or set off to the amount of five hundred dollars was not allowed to the defendant and appellant.

The defendant cannot be allowed as a set off, a payment made by him for the plaintiff, unless he shews it was made, at the request of the latter

His right to it depends entirely on the testimony of Josiah S. Johnson, which shews that the defendant paid to this witness five hundred dollars, on account of the plaintiff's ancestor, but does not establish the fact that this payment was made by the ancestor, at the request of the latter. As this circumstance was not made to appear, the district court was correct, in refusing to allow the set off.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Scott for the plaintiff, *Wilson* for the defendant.

MUSE vs. *CURTIS.*

When a case is remanded to be proceeded on, after a reversal of the judgment, the district court may act on the verdict theretofore rendered.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff, in this case, had a verdict and judgment—the defendant, on an appeal obtained a re-

versal of the judgment, on the ground that it contained the citation of no law, nor any of the reasons on which it was grounded, 5 *Martin*, 686. Whereupon the case was remanded, with directions to the district judge, to proceed and give judgment, according to the directions of the constitution and law. He did so, in favour of the plaintiff, and the defendant appealed.

His counsel assigns as an error, apparent on the record, that the judgment was given at November term, on a verdict rendered in June preceding, without any new proceedings thereon : whereas, it is contended, a trial *de novo* ought to have taken place, on the return of the case into the district court.

It is urged that a *reversal*, like an *arrest*, of judgment, avoids the verdict, on which it was rendered. We do not think so.

A judgment is arrested, when it appears that the record is so imperfect, that no judgment can be rendered thereon. It is, therefore, clear that, in such a case, the verdict can be of no avail—for it finds facts, on which no judgment can be given. The defect is in some thing *anterior* to the verdict, and *sublato fundamento, cadit opus.* When, on the contrary, the defect is some thing *posterior*, the verdict is not affected thereby, and nothing prevents its being proceeded on after the reversal of the judg-

West'n District
September, 1820.

MUSE
vs.
CURTIS.

ment, if there be no defect in the proceedings anterior to the verdict.

The counsel further relies on a provision of the court law, 2 *Martin's Dig.* 193, *n.* 14, which requires that the district judge should render their judgments, in the shortest possible delay, and they should never leave in suspense any decision in cases tried, when they close a session of their respective courts.

In the present case, the letter of the law has been complied with. The district judge proceeded on to the determination of the cause, according to what appeared to him just and legal. This court has, however, been of opinion that he erred, and reversed his judgment. Hence, the counsel of the defendant and appellant argues that the law cited, forbidding the district judge to leave any case in suspense, on the rise of the court, precludes him from doing any thing therein, afterwards; that, if a cause be not finally disposed of on the adjournment of the court, or if the judge be prevented from proceeding by sickness, or if he die, it is an end and the parties must begin *ab ovo.*

A construction of the act in this manner would be what lord *Coke* calls *maledicta expositio quæ corrodit viscera texti.* The intention of the legislature was clearly the dispatch of business—the speedy termination of suits. This construction leads to the

delay of justice, to the perpetuation of legal contests. We cannot admit it.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Wilson for the plaintiff, *Baldwin* for the defendant.

VICK vs. *DESHAUTEL.*

APPEAL from the court of the sixth district.

A contract by which one party gives a quantity of cattle and all the land he has, in consideration of the promise of the other that he will support him is valid.

MATHEWS, J. delivered the opinion of the court. In this case, both parties, being disatisfied with the judgment of the court, appealed.

The plaintiff sets forth in his petition a contract entered into with the defendants, by which he transferred to the latter, all his right and title to a stock of cattle, supposed to amount to one hundred head, and also all title and claim to any land he may have and the defendant, in consideration of this transfer of property, bound himself to support, nourish and maintain the plaintiff. The answer charges that the contract is null and void, and that the defendant failed to perform his part of the contract.

We are of opinion that the contract, entered into by the parties to this suit, is good and valid in law, and as the breach assigned against the defen-

West'n District. *September*, 1820.

VICK
vs.
DESHAUTEL.

dant, is not supported by the evidence in the cause, we are of opinion then the plaintiff has not supported his action.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed that there be judgment for the defendant, with costs of suit in both courts.

Baldwin for the plaintiff, *Scott* for the defendant.

HUBBARD & AL. vs. *FULTON'S HEIRS.*

The maker of a note cannot avail himself against a fair endorsee, of an equity that would have destroyed the claim of the original payee.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs, as endorsees, brought this action on a note of the ancestor of the defendants to James Rogers. The defendant pleaded the general issue and that the note was given in discharge of a judgment, obtained by Rogers, as curator of the estate of A. Phillips, deceased—that the said James Rogers was recognised as heir of Phillips by a judgment of the district court, which has since been reversed, and Thomas Rogers, who was recognised by the supreme court, has brought suit for the amount of the judgment intended to be paid by the note sued upon—so that the defendants, if they

fail in the present suit, will have to pay the same sum twice.

The execution of the note and its endorsement were admitted and the allegations of the answer, out of the plea of the general issue, proven.

There was judgment for the plaintiffs and the defendants appealed.

Altho' the matter pleaded in avoidance of the claim would have affected it, in the hand of the original payee of the note, it cannot do so in the hands of a fair endorsee.

It is therefore, ordered, adjudged and decred, that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Scott* for the defendant.

HAYES vs. *CUNY.*

APPEAL from the court of the sixth district.

When a suit is instituted by a licensed attorney, his want of authority cannot be pleaded in abatement.

Licitation is a mode of dividing estates held in common and may be avoided, like any other contract by the parties thereby.

A will cloathed with all the re-

MATHEWS, J. delivered the opinion of the court. This suit was brought by the plaintiff to recover her portion of the estate of her mother, as co-heir with the dafendant and others. He is sued as executor of the will of the mother of both parties and the plaintiff claims her distributive share of the estate in conformity with, and to the amount of a sale, made by the parish judge, under an agreement

West'n District. *September*, 1820

HAYES tr. CUNY.

between John Archinard and the defendant, for the purpose of effecting a division of the estate of C. Archinard and that of his wife, the ancestor of the parties to the present suit.

quisites of the law, can only be avoided by attacking its genuisement.

The answer denies all the allegations of the petition and contains also a plea of abatement to the action, on account of the want of authority in the attorney, who instituted it. Both parties, being dissatisfied with the judgment of the district court, appealed.

As to the plea in abatement, we are of opinion that the court below was correct in disregarding it.

The action is commenced by a counsellor and attorney, regularly admitted and licensed to practise as such, in all courts of justice of this state. He is a sworn officer, bound by his oath as well by the principles of integrity and honour, which ought to characterise the profession of which he is a member to act correctly in its pursuits. Thus situated, it is not to be presumed, that he acted, in the present case, without proper authority. On the contrary, every presumption is in favour of his having pursued a proper course of conduct, unless the contrary should be suggested, by the opposite party, on affidavit. It is true that an attorney of the court may be deceived, by the conduct of others, so as to undertake to represent a person, from whom there is no authority to that effect—and, on a sug-

gestion of an error of this kind, upon affidavit, it would become the duty of the court to ascertain the truth.

The sale made by the parish judge at the request of John Archinard and the defendant, in the present suit (the one representing his deceased mother, as executor to her will, the other as heir to the late C. Archinard) was a cant or licitation between the parties for the purpose of dividing the property, which had been held in common by their ancestors, by which they would perhaps have been bound, had either party insisted on it. At the time that this transaction took place, there was a suit still pending between the parties, relating to their rights to the common property of C. Archinard and his wife, the textatrix of the defendant, in which a decree was rendered by a competent tribunal, directing the whole property of both estates to be sold at auction and pointing the manner, in which the proceeds were to be divided. When this decree was rendered, neither party opposed to it the cant, which had previously taken place, and which seems to have been considered as null and void, by common consent. Cant or licitation is a mode of dividing property held in common by two or more persons and may be avoided by the consent of all those who are interested, in the same manner that any other

West'n District. *September*, 1820

HAYES vs. CUNY.

contract or agreement may be avoided, which is entered into by consent of parties.

It is clear that the decree of the late territorial court does not vitually annul the proceedings of the parish judge in the licitation made at the request and by the consent of the parties.

R. E. Cuny, as executor of his mother's will, had a right to act for all the persons who claimed an interest in her succession. By a judgment of the superior court of the late territory, this succession has been sold publicly—which was considered to be necessary and proper, in order to separate it from that of the late C. Archinard, and we are of opinion that the amount produced by the sale, establishes the value of the estate of the testatrix, as it should be divided among her heirs.

Since the appeal, some objections have been made to the validity of Mrs. Archinard's will. It is subscribed by five witnesses, and was proven before the judge of probates by four (a number more than sufficient to render it executory) and has been acted under by the executor, in every thing which relates to its disposition till the present time. Being cloathed with all the formalities required by law, its validity could only be questioned by attacking the genuineness of its execution, which has not been done in due form.

It is therefore, ordered, adjudged and decreed,

that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiff, *Johnson* for the defendant.

SHIP & AL. vs. *CUNY & AL.*

APPEAL from the court of the sixth district.

A statement of facts, without a date, made *as well as is recollected* and stating that other facts were proven, which the judge considered as immaterial, is not good.

MARTIN, J. delivered the opinion of the court. This appeal was made returnable to October term, but has, by consent, been argued at this. A statement of facts proven on the trial, by the witnesses, comes up with the record, certified by the district judge, without any mention of the time, at which the statement was made, or of the manner, in which it was obtained by the parties. It is clear from the terms, in which it is expressed, that it was under circumstances, which left the judge in doubt as to its fullness and correctness. In the commencement, he uses an expression, unusual in statement of facts, viz: *as well as I can recollect*, and he concludes by saying that there were many other facts proven, which he considered immaterial.

We are of opinion that this cannot be considered as a statement of facts, made in conformity with the provisions of the court law of 1813—and it

West'n District. *September*, 1820.

SHIP & AL. vs. CUNY & AL.

is clearly not a transcript of the testimony taken, as required by the act of 1817.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Baldwin for the plaintiffs, *Thomas* for the defendants.

PORTER vs. *DUGAT.*

If the parties agree that a statement of facts be made by the judge, and he decline doing so, having forgotten the facts and lost his notes, the appellant will be relieved.

If a plea of prescription be received at the trial, the part pleading it must be permitted to submit the fact of his possession to the jury.

Whether the plaintiff may be perpetuall. enjoined from claiming the premises? Certainly not, when it was not prayed for in the answer.

APPEAL from the court of the fifth district.

Brent, for the plaintiff. The singular circumstance attending this case will considerably shorten the argument. The court will see, by a *statement signed* by the counsel for the petitioner and the defendant, that of the facts and testimony given in this case below, owing *to the circumstance detailed* no *statement* has been made out. It is a hard case upon both the *petitioner* and the *defendant*. But such as it is, we must submit to it, and it rests alone with this court to relieve the petitioner from the *injustice* which results from it. I need not enlarge upon the circumstance, and content myself with referring the court to the *statement* in record.

To say, that this case is *without a remedy*, would

be unjust, and fortunately for the appellant, the case is provided for by the *positive laws* of the state, and, before I trouble the court with my remarks upon the *other points* I intend to make in this cause, I pray that the cause be remanded to the court below for a new trial, because justice requires it. The judge in the court below having omitted to make out *the statement of facts* as agreed upon, and *now* not being able to do so, having *forgotten the said facts* and *lost* his notes.

No *fault* exists with appellant. The statement negatives such an idea—and will this court suffer his rights, his interests to be sacrificed, when it is in their power to relieve him? Without the *facts* in the cause, this court cannot decide. The *facts* from the inattention of the court below *cannot be had*—and shall the petitioner *who is not in fault*, who conceived his rights secured, be deprived of an hearing for his, upon an appeal? I trust not, and that this court will extend him the relief asked, and grant a new trial—no *injury can be done to the appellee*, he is in possession of the property, and if the *evidence* and *facts* and *law* and *justice* are in his favour, he will have the same opportunity of having his case decided, as if the *facts* were *now* before this court. But, reverse the picture, and see the inevitable injury to my client—he is forever hushed. His title to his land gone forever—no re-

West'n District. *September*, 1820.

PORTER vs. DUCAT.

medy, no relief, if this court refuses his motion.

The law says, it is the duty of this court to remand *the cause to an inferior court, from which the appeal is made, whenever it shall appear that justice requires the same.* 2 *Martin's Dig.* 144.

It has been so decided to be the *bounden duty* of this court to remand it, in cases where an injustice might be done. *Sorrell* vs. *St. Julien*, 4 *Martin*, 510.

I will ask this court if, under these circumstances, *justice* does not require that this cause should be remanded, for a new trial.

Leaving this part of my argument, I will shew the court from the *face* of the record and *the bill of exceptions taken* that, upon two other grounds, this cause ought to be remanded.

1. Because the court below erred in refusing the *petitioner* to have the *fact of his possession* of the land for ten years under a good and just title, *submitted to the jury.*

2. Because the court below erred in refusing to grant a new trial upon the affidavits filed of *new discovered evidence.*

I. The court is referred to the bill of exceptions in the record, and also to the plea of *ten years prescription* with just title. This *plea* was filed with the *permission* of the court, after the trial began, upon the discovery of that *fact*, in the course

of the examination of the witnesses—and after it was filed, the petitioner moved the court to permit him to add the fact of the ten years possession for the enquiry of the jury, and to examine witnesses to establish it, which was denied as appears by the bill of *exceptions taken.*

This denial of the court was most certainly contrary to law and justice, or why *permit* the plea of prescription? Why defeat the object of the plea, by refusing the petitioner the right of establishing it? Are not such proceedings absurd?

The law, says the party, may file the plea of prescription at *any stage of the cause. Civ. Code, 482, art.* 36.

It is a highly privileged plea, and yet the judge below *would permit the plea to be entered,* but defeated its object by a rejection of the proof of possession, or rather by refusing the petitioner the right of submitting that fact to the jury: the only fact by which the plea could be supported. Will not this court correct the error? Does not *justice* require that for this reason the cause should be remanded? If it does not, I am much mistaken in my ideas of justice.

The court ought to grant a new trial, upon the discovery of *new material evidence* to the cause since the trial. 2 *Martin's Dig.* 156.

If the court below refuses a new trial upon the

West'n District *September*, 1820.

MUSE vs. CURTIS.

discovery of a *new evidence*, this court will remand the cause. 4 *Martin's*, 508, *Sorrell* vs. *St. Julien.*

The only way of shewing to the court the new evidence discovered is by affidavits—*ib.*

The requisite affidavits were made by the petitioner and a disinterested witness.

The affidavits shew tfie *newly discovered* evidence *since the trial*, and that the petitioner did *know of it before* and that with *reasonable diligence* he could not have discovered it before, and that the new evidence *is material*, and further states that the new evidence will prove the only fact in dispute in the cause in favour of the petitioner.

It may be necessary here, for me to observe to the court that this is a dispute about the *location* of a tract of land, and that by a *a case agreed* between the parties, there was but *one fact to be established*, which was where "the grosse isle spring" the beginning boundary of the land was in the year

whether at A or B as noted on the plats of survey with the record—if at A, the petitioner was entitled to recover, if at B the defendant was entitled to recover.

After making this statement I will only observe that the affidavits swear positively that the new evidence, will *establish* the beginning boundary, "the grosse isle spring" at A and in favour of the defendant.

I am deprived of shewing to this court the force of the new evidence, from the want of the *statement of facts*, which we have not from the circumstances before detailed, and which more strongly shews the *necessity* and *justice* of remanding this cause upon the first ground: for without the statement of facts, it is impossible that justice can be done.

Porter, for the defendant. The first ground, relied on by the plaintiff, to have this cause remanded is, that of the district judge not having it now in his power to make out a statement of facts, which the counsel on both sides consented he might do. This I consider the same thing as if he had moved to remand it, *because no statement was made out according to law.* The defendant regrets the circumstance very much, but the question here, is who is to suffer by it.

This court from its organisation, down to the last printed report received here of its decisions, have held in a series of cases beginning with that of *Harrison* vs. *Mager*, 3 *Martin*, 397, and ending with *Dennis* vs. *Bayon*, 7 *Martin*, 446—that when there is no statement of facts, bill of exceptions, special verdict, or case certified, according to law the appeal must be dismissed.

What reason prevented the appellants in all these cases from bringing up their appeal in the mode

West'n District. *September*, 1820.

PORTER vs. DUGAT.

pointed out by the acts of the legislature—we cannot gather from the reports—the parties have never attempted to get their appeals maintained by assigning causes *why they had not the statement.* It is reserved for the ingenuity of counsel here to *make the plaintiff's own act*, which places him in a disagreeable situation, the ground for extending him relief.

The act of 1813, 1 *Martin's Dig.* 442, organising this court, provides that the statement of facts may be made out at any time previous to judgment. In the case of *Syndics of Hellis* vs. *Asselvo*, 3 *Martin*, 201—this tribunal, in an elaborate and most able opinion, entered into the reasons that induced this legislative enactment, decided that it must be done in all cases before judgment signed, and that a statement made subsequently, unless by consent of parties is inadmissible.

The act of 1817, *page* 34, *sec.* 13, introduced some change, on this subject in cases "where the facts proved shall appear on the record by the written documents *filed in the same*" that the judge might certify, &c. Under this law, it has been decided in the case of *Franklin* vs. *Kimball's executors*, 5 *Martin*, 666, that in a case under this act the judge might make out a certificate at any time. Because when the facts are established by written documents, the same reason does not exist to in-

hibit the judge from a subsequent statement, as when, twelve months after judgment, he pretends to make out from memory a detail of a mass of parol testimony.

The proper time then for the plaintiff to make out his statement was before judgment—he has not done so. Can he profit by this circumstance? Surely not. The defendant, it is true, agreed that it might be done afterwards—but, as he had no interest in taking up the appeal, he consented, for the convenience of the plaintiff, who, in adopting this course, *necessarily took upon himself the risk of all accidents* that might occur, until the statement was completed. But, by the decision prayed for here, the defendant and appellee runs it seems, all the risks—nay more the parties are not be placed *in the same situation they were after the verdict*, but an important decision is to be made, highly advantageous to the plaintiff, a new trial is to be accorded him—for no other reason, except that he did not bring up the testimony to shew that he might be entitled to it. Can this be justice?

And this brings us to another distinction in this cause. It is not one where this tribunal is called on to exercise its powers by bringing before it facts which, in the *ordinary course of proceeding*, it has a right to revise, as in the case where the court tries both *fact* and *law*, and from whose decision

West'n District
September, 1820.

PORTER
vs
DUCAT.

on each there is an appeal here. But, it is a case where the facts have been already found by a jury whose decision (see acts of the legislature 1817, *page* 32, *sec.* 13,) is conclusive on the parties, unless *where by law* the parties have a right to a new trial. The difference then is, where the trial is by the court below, this tribunal has in its ordinary jurisdiction the right to revise the facts, and no presumption is created against the party cast by the revision. When by the jury, *a violent presumption* is created of the truth of their finding—and, a much stronger case must be made out, to justify the court interfering in the one case than in the other.

But the defendant and appellee by the decision prayed for, loses the benefit of this principle, and he is to lose every benefit which the law gives him, every presumption which its wisdom and its justice would have accorded him, had the testimony been sent up. Had that testimony came here, he would have been authorised to insist.

1st. That a new trial will not be granted where there is contradictory testimony—even tho' the verdict is against the opinion of the judge, who tried the cause. 3 *Binney*, 317, *Strange*, 1142, *two cases*—1 *Caines*, 24, 1 *Wilson*, 22, 2 *Binney*, 208.

2d. That it will not be granted when the case has

turned on the credibility of witnesses. 7 *Binney*, 495, 3 *Johnson*, 271, 1 *Bibb*, 486, 5 *Martin*, 333.

3d. That it will not be granted unless the verdict is *manifesely* against evidence. *Bacon's ab.* A E. 664, *and cases there cited.*

4th. That if the judge below who heard all that was proved—and *saw* and *knew* those who proved it refused to interfere—this court could not—all this he could have insisted on: tho' he would not have been under the necessity of doing so on the evidence. But all this is to be lost to him—and this court is called on to presume. That the verdict of the jury is contrary to evidence. That it is *manifestly* against the weight of evidence. That the testimony was not contradictory. That it did not turn on the credibility of witnesses. That the judge below violated his duty or erred in refusing to grant a new trial. And this is to be presumed against the defendant, *tho' the law presumes the very reverse.* The case then stands thus: if the statement had come up there, there is every probability a new trial would not be granted—but as it has not come up, the motion must be accorded. Was any thing like this ever seriously contended for before, and can this be justice?

The true legal principle is this:—courts in the exercise of their powers will go as far as possible to prevent any injury that may arise from the omis-

West'n District. *September*, 1820

PORTER vs. DUCAT.

sion of the parties. They will endeavour to place them in the same situation they were before that omission took place, provided they can legally do so. "But they never will decide an important question connected with the merits of the cause and depending on those merits, merely to enable them to ascertain whether or no the party had a right to that decision." It is this principle which is sought to be violated here. The court is asked to grant a new trial, a most important advantage to the plaintiff, for the purpose of getting up evidence by which they may ultimately know whether or not they were right in according it.

The counsel has cited the act of our legislature and the decision of this court, that it is the bounden duty of the tribunal to remand a cause whenever it shall appear that justice requires it. True, whenever *legal justice* requires it—and whenever the injustice complained of is made apparent by *legal proof:* here the injustice complained of is supposed. How does *it appear* to this court that the jury and judge below did injustice to the plaintiff.

I shall next in order take up the newly discovered evidence: as to that of prescription, there will be little or no difficulty in regard to it.

The counsel has quoted the acts of the legislative council (2 *Martin's Dig.* 156, *sec.* 6,) that the discovery of "*new material evidence*" is a

ground for a new trial. But that act also gives the limitation "which the party could not by *reasonable diligence*" have discovered before. This too is the language of reason as it is of all the authorities on the subject. *Strange*, 691, 1 *Wilson*, 98, 7 *T. R.* 269, 2 *Binney*, 582, *Hardins' Rep.* 342, 1 *Bibb*, 420.

The only questions then are did the plaintiff use due diligence ? And was the evidence material ? Both I think must be answered in the negative.

This suit, as correctly stated by the plaintiffs' counsel, depends alone upon the location of a grant which both parties hold under—their relative position *in it* being changed as it is decided to begin at A or B, as represented on the plat of survey. This was the matter in contest from the time the suit commenced, and that to which the attention of each party has been, or ought to have been anxiously directed from the first. The petition was filed in May 1817 and the cause was tried in Oct. 1819 (see record) there was of course two years and six months for each party to prepare himself on this single point.—

Now, in all this time it was the duty of the plaintiff, who was preparing for the trial of the cause, to have sought for this testimony. The first thing a man would naturally enquire for in a case of this kind, that turned on the location of his grant, who am I

West'n District. September, 1820.

PORTER vs. DUGAT.

bounded by—how were those that joined on me located—were there older or younger grants than mine—were they surveyed—have the surveys been returned? All these are proper and material, and necessary enquiries and *such as every diligent man makes.* If they had been made by the plaintiff, he would have had no difficulty in getting this information, while he never heard *of until the evening of the day in which the jury gave in their verdict:* for the papers were all in the land office in Opelousas.—The testimony here was not hid in a corner, *was not in the possession of a private individual, who might have concealed it from him.* It is sworn to be in the surveyor's office: a public office open to every one.—The title which came to his knowlege is also sworn to have been confirmed by the United States; it was there in the register's office at Opelousas which is open to the inspection of all—The first place, which every one examines who has a land suit to try.—He never, it appears, ever looked into the surveyor's office to know how the grant he claimed under was located by the United States, if he had he could not have failed to have found Drake's besides it—for Johnson (see affidavit) swears that it has been returned there by the deputy surveyor. Let it be remarked too that, during all the time that elapsed from the bringing of the suit until its trial, he lived in the next county, where these papers were de-

posited. If this is *reasonable diligence*, to lay the ground of a new trial—it may be simply asserted that the want of it can never be brought home to any man. Another fact, highly illustrative of his diligence: the very witness, who communicated the intelligence to him, is one who surveyed the land by order of the court, (see plat of survey) and who was sworn on the trial before the jury (see Johnston's affidavit.) The court is asked to compare the facts here, with the cases already cited on this branch of the subject, where a new trial has been refused.

But the evidence was not material and could have had no effect on the cause. The dispute between the parties here was respecting the *original location* of an antient Spanish grant, issued in the year 1781. The witness swears that he has seen a Spanish title—*he thinks* an order of survey to one Aaron Drake, for twenty-five arpents lying below A so as to include B. Be it so, and what does that prove? Why nothing, unless we knew that the Spanish government never issued two titles for the same land. Unfortunately, however, this country has had melancholy experience on the contrary. We know that they interfere too often to justify any one in drawing the conclusion that, because one grant commences at a given point, say A, that the other must necessarily be at a different place say B. If such evidence had been introduced, it would only

West'n District. September, 1820.

PORTER vs. DUCATE.

have proved the two titles interferred, but it would not have controlled the location of ours, as it is the oldest grant, See Johnson's evidence where he states that Drake's title called to bind on De la Houssaie. On the whole, I cannot see what weight this evidence could have had, supposing it to have been produced on the trial. It is of that kind which is generally furnished, by way of consolation, to the party cast in the suit.

It may be perhaps urged that it would have been useful to the plaintiff in giving more weight to the other evidence produced by him. But new trial, are never granted to let in *cumulative testimony* to a fact disputed at the trial. 8 *Johnson's Rep.* 86. It would be endless, says the court, if every additional circumstance bearing on the fact in litigation was a cause for a new trial.

The counsel states that the affidavits are positive, as to the fact they will establish—but it is the court not the party, that must judge of the materiality of evidence, in applications of this kind. 1 *Caines' Rep.* 24, 2 *ib.* 67.

With respect to remanding on the plea of prescription, the defendant has not the slightest objection if the court is satisfied that on legal principles it has the authority to do so. But in remanding it the defendant insists that, it must be for enquiry *on that fact alone.* If the whole cause is to be re-

examined whenever a party pleads prescription—which he may do at any stage of the cause, it is quite obvious that every litigant can have his case twice tried by keeping back this plea until the other facts are found.

The counsel states that the judge permitted him to file the plea, but refused to let him submit it to the jury, and ask, can any thing be more absurd—and I say that nothing in my opinion can be more correct. A slight examination will prove it. The cause had stood at issue for five terms of the court—the parties came prepared to try the question arising out of the pleadings—a number of witnesses attended at a most ruinous expence—the jury were sworn to try certain facts, (see record) after they were sworn to try the facts, the plaintiff amended his petition by pleading prescription, and then moved to have that fact submitted to the jury. To this the defendant's counsel justly objected that they had not come prepared on that branch of the enquiry—had received no notice of it—had never turned their attention to it, and could not go into the trial of it then. The court decided that the defendant could not be compelled to try the question of prescription on so short notice—that, as the jury were sworn and the trial in part gone into the court could not discharge them—That, if the court had the power, it would not, as it would only have the

West'n District. *September*, 1820

PORTER *vs.* DUCAT.

effect of forcing the parties to return at the ensuing term, with all the testimony then hearing on the trial—that this course of proceeding worked no injury to the plaintiff—that an issue could be made up on the amended petition and sent to another jury for trial, and that judgment would be suspended, on the facts then found, until that issue was tried.

There is no doubt then—but the court decided correctly. For *as prescription can be plead at any stage of the cause*, it follows *of necessity that it can be tried at any stage of the cause*, as well after the other facts are found as before. It is the duty of the court to see that this privilege, which the law gives one party, is not used to the injury of the other. It would be monstrous for example to say that if the plaintiff had chosen to file his claim by prescription after the facts were found by the jury—that the whole case would have to be tried again. It would be equally unjust, where he did not amend his petition until after the jury were sworn and had gone into the trial. If a party will delay this plea to so late an hour, all he can expect *is to have it tried*. But he ought not to be allowed to use it as a weapon of annoyance against his adversary, by forcing him to go into the examination without notice, or turning him over to another term on the questions at a ruinous expence—nor ought he to have the privilege of obtaining a re-examination of *all the other*

facts in the cause, merely because it pleased him to present that of prescription too late to be submitted to the jury, who tried the other questions that arose out of the original pleadings.

Why the plaintiff did not think proper to have an issue made up, and this question of prescription tried, before he appealed—it is not for the defendant to say. Whether he has not lost the benefit of it by the course he has thought proper to adopt, is left to the court to decide—the defendant repeats that he is willing, nay desirous to enter into the enquiry as far as that enquiry can affect the merits of the cause; for he too will rely on prescription. But he regrets the delay, and the expense that must attend it. His poverty rendering him unable to sustain a protracted contest of this kind.

I trust then I have shewn the plaintiff has no right to a *new trial*. If the cause is remanded on the question of prescription, it must be on payment of costs by the plaintiff, as it was his own fault it was not tried before he took the case up.

I shall not travel out of the record—nor say one word of the equity of this case, merits or justice—I wish I was permitted to do so, and shall conclude by submitting it with confidence to the court.

Brent, in reply. The first ground taken in this cause, was to *move* the court *to remand it*, be-

W'est'n District. September, 1820.

PORTER vs. DUCAT.

cause the judge had not made the *statement of facts*, as it had been agreed he should do (see statement in record.)

In replying to this motion, it has been observed that, it amounts to a motion to remand this cause, because "no statement was made according to law."

By a reference to the very numerous cases, from that of *Harrison* vs. *Mager*, 3 *Martin*, 387, down to *Dennis* vs. *Bayon*, 7 *Martin*, 446, where the appeals, for want of statement were dismissed, it will be seen that the appeals were there dismissed, because the appellants *had neglected to make out the statement*, and did *not account for not doing it*. This is a very different case in all its features. *Here* the appellant, as will be seen by reference to the statement on record, was not neglectful of the legal requisites, in proper time. Before judgment signed, he offered to make out the statement of facts, and not being able to agree with the defendant's counsel, it was agreed, by both the parties, "that the judge should make out the statement of facts, at that time or after judgment signed, as he the judge should think proper"—which the judge promised to do. Is this a similar case to any one of those refered to? And in what respect has the appellant been neglectful, or in the wrong? He offered to make out the statement of facts, at the proper time—but not being able to

agree with the defendant, at the same time, the judge offered to make out the statement of facts himself, which both the appellant and appellee agreed to—and the appellant, resting upon the agreement, made in good faith, sanctioned in open court, is now told that this case does not differ from ordinary cases, where no statement of facts have been made. If such a doctrine should be contenanced, it might in truth be said "that there was no such thing as justice, and that courts were only snares to entrap the honest."

The counsel for the defendant says that the petitioner ought not to be permitted to take advantage of his own wrong—nor does he ask such thing—he is in no wrong. He proceeded regularly to bring up the testimony in the case, and the defendant, knowing and feeling the justice of his case, now wishes to shut him out of this court by objecting to the cause being remanded—Is this justice?

It has been frequently repeated, that the appellant ought to have had the statement of facts made out, as the law directs, and that he ought to have done it himself. There are three ways pointed out by law, to make out the statement of facts. The parties can do it, or their counsel or the court, if they disagree, see act of 1813. 1 *Martin's Dig.* 442. Here the law declares, that the statement of facts shall be made out, by the judge, if the parties or counsel disagree.

West'n District. *September*, 1820.

PORTER vs. DUGAT.

In the very case before the court, the counsel not agreeing, it was consented that the judge should make out the statement. He has not done it—nor can the parties yet agree upon the facts, and would it not be an injustice to condemn the appellant, when he has shewn that he has been guilty of no omission? If the arguments of the defendant's counsel are to prevail, the greatest injustice will often follow. The party, in whose favour judgment below is rendered, has nothing to do, but to disagree as to the facts with his adversary: and if the judge refuses, or neglects to make out or forgets the facts in the cause, the appeal must be dismissed—Is this justice? No, this court sits here to see that justice shall be done, and wherever, from the proceedings in causes it shall appear that an injustice might result from any act not committed by the neglect of a party in a suit, their bounden duty, in the words of the decision of this court before quoted, is to see that justice be done to all and that the cause be remanded. In this case it is as much the defendant's fault, as the petitioner's, that it was agreed that the judge should make out the statement of facts.

It is said on the part of the defendant that this court ought not to remand for the reason given, because the finding of the jury, and the refusal of the court to grant a new trial, presume in favour of the defendant and that this court would not grant the

motion, if the evidence was before them. I am astonished at such an argument—certainly, the proceedings of the court below presume nothing against the petitioner. It is of the injustice of those proceedings, the petitioner complains: and I do not conceive how proceedings, alleged by the petitioner to be unjust and illegal, can operate against him—The law grants the appeal, without attaching to it any such presumptions, as contended for.—but, if this court is *to presume at all*, it will rather presume in favor of the petitioner: for, if the evidence was in favor of the defendant and his case a good one, why fear another trial? I do not mean to cast any reflection upon the judge below, but it is extraordinary, indeed, that the facts were not made out by him.—I will not say that he omitted it, to *defeat the correction of an error* in his court—I do not believe that such motives actuated him, but yet if presumptions are to have weight, in this case, the petitioner might urge all these things, as presumptions in his favor.

I admit, as stated in the argument of the defendant's counsel, that this court might not have granted a new trial, if the testimony *had been contradictory*; but I contend that, where there was no *contradiction* and *all the evidence* in favor of the petitioner, this court would order a new trial—and this the court might have been satisfied of, in this case, if the *statement of the facts* had been made out, *as agreed upon*.

West'n District. September, 1820.

PORTER vs. DUCAT.

It is also observed, that if the judge below, who *saw* and *heard* the testimony, refused the new trial, it is to be presumed that this court would also.—It often happens that, in cases like the present, *where upon an appeal justice can be had*, the court below, *indecisive* as to the opinion it ought to give, prefers to maintain the finding of a jury, to take the responsibility on itself, and at the *same time* that it *decides*, *expresses its doubts*, but reconciles its opinion with a belief, that if wrong, a supreme court will correct it; such may have been the case here; but I must confine myself to the record.

What *inconvenience* or *injustice* to the defendant can result from this cause being remanded? He is in the peaceable *enjoyment* and possession of it, and if his cause is a good and just one, he has nothing to fear. The same testimony will be heard again and if, in his favor, he is certain to succeed, and the petitioner will be compelled to pay all costs, and will be the loser by it.—This is not like a *case of debt*, or where the party, who asks for relief is in *possession*: *here delay and procrastination* are no motives, can be no *object* to the petitioner; for the defendant possesses the property.

On the contrary, if the court will not remand this cause for the reason given, and if the *law*, if the *testimony*, if *justice* are with the petitioner, *where* and how can he ever obtain relief? Never. His fate is sealed,

his rights are gone; his property the reward of his labour and his honesty, the only support of his family, is lost to him forever.—Before this court will do any thing, which might be attended with such *evil* consequences, I call upon it, to pause and reflect well, and, in doing it, I am satisfied they will remand this cause, and have it placed in a situation *that justice may be done.*

Again, I repeat that the judgment of the court below *presumes* nothing in its favor, and if necessary to rebut this idea, I might only refer to the *number of cases, reversed by this court,* by which it would appear, that the presumption is rather the other way.

The defendant's counsel objects to this cause being remanded upon the ground of newly discovered evidence; and as he has taken up this part of the argument, before the second ground taken by me, I will follow him in his argument.

The serious objection, to this part of my argument, is that the petitioner did not use "*reasonable diligence*" to discover the new evidence; I beg the court to observe that neither the *law,* nor the *practice* of any court, requires the diligence to be more than "reasonable diligence"—It does not require that every thing should be done, that might be done to discover the new evidence; it only requires that *reasonable* exertion, which every man gives to his affairs, that ordinary attention to hunting up testimony which

West'n District. *September*, 1820.

PORTER vs. DUGAT.

would shew that he procured all the evidence within the compass of his knowlege, and that he did not keep back any testimony which he knew of, or which, by reasonable exertion, he might have discovered; To judge of the *reasonable diligence*, the court must look at the affidavits and take the facts as they are there sworn to.

The defendant says that *no diligence* was used by the petitioner, that he ought to have looked for the new discovered evidence in the surveyor's office, where it appear, by the affidavit of Johnson, he saw it; now I differ in opinion with the petitioner's counsel; the surveyor's office is not a place to look for such papers; the register's office is the place, and as the petitioner swears that he used "reasonable diligence" to procure all testimony, that might be material to him, the presumption is that he looked into the register's office for all papers that might establish the beginning line of his land. But, how can this court reasonably require that the petitioner should have looked into the surveyor's office for this *new evidence*, when he *swears positively that he knew nothing of it, until after the trial*? The defendant's counsel also observes that the witness, who told the petitioner, was the surveyor who surveyed the land, and sworn upon the trial, and yet it is singular he did not speak of such evidence before? As singular as it may appear, the witness swears he never *named* it to the petitioner, *until after*

the trial; so that the petitioner knew nothing of it. The witness having been sworn, upon the trial, who communicated the discovery of this new evidence, makes no difference. *Jackson vs. Laird*, 8 *Johns. Rep.* 484.

The counsel says the first enquiry ought to have been by the petitioner, by whom he was bounded: and in making this enquiry, he ought to have looked into the surveyor's office. Not so: by a reference to the petitioner's title, or grant under which he claimed, he he is bounded *by no person*, so that from *it*, he obtained no information, he then ought to have applied, at the register's office, which it is presumed he did, where all titles are registered, he finds nothing of it, and in reason it could no be expected that he looked further.

But, says the counsel, the evidence *cannot be material*; I think the contrary. The petitioner and Johnson state, in their *affidavits*, that the *survey* and *the proceedings theron*, will *establish the* "*grosse isle spring*" at A, as contended for by the petitioner; now this court knows, that it was usual, under the Spanish government, when surveys were made, for the *owners* of the adjoining lands to be present, and suppose, in this case, the original grantee, under whom both parties claim had been in person present at the survey, stated in the affidavits, and *had signed the same declaration together, with the other neighbours*

West'n District. September, 1820.

PORTER vs. DUCAT.

and the surveyor, that the "grosse isle spring" was at the *spot* marked A, and that was the beginning boundary of his (De la Houssage's) land, from which corner Drake took his beginning, I ask this court, if such evidence would not *have been material*; and yet, we must believe that such was the fact, as Johnson swears, not that the *survey alone*, but that the survey with *the proceedings thereon*, will *establish* the "grosse isle spring" at A. How can it be contended then that this evidence is immaterial?

With respect to the plea of prescription, I do not conceive that the defendant's counsel has said any thing, to shake the position I have taken.

It is contended that the court below did not err, in refusing to submit the *possession of the petitioner as a matter of fact* to the jury; I think I have already shewn that it did.

It is said that the defendant could not be compelled to try the question of prescription, on so short a notice, nor is it contended by me that he was.—If he was not ready, a juror could have been withdrawn, and the case continued for trial to another term; such an indulgence, if asked for, could not have been refused; but none such was claimed; but the defendant ought to have been ready, to put that fact at issue by *his answer*.

As I shewed before, the fact of possession *often comes out upon the trial*; which was the case here,

and it was to meet such a case, that the law permits the plea of prescription to be entered, at any stage of the trial, and *when entered*, with due respect to the opinion of the counsel, I think *it is an exception to the action upon its merits, and in regular proceedings ought to be disposed of first.*

I beg leave to correct the statement of the defendant's counsel, that the court below offered to call another jury to try *the fact of possession*. Such was not the case, nor does it appear from the bill of exceptions; but even if it had, I doubt much if such a proceeding would have been legal. The amended petition could not be considered, but as a part of the original, and the pleas in issue, *the same*, as if originally made up, and the law declares that "*the jury are sworn*" to decide the question of *facts* alleged and denied in the *pleadings*, acts 1817 page 32, sec. 10; before quoted. The *possession for ten years, under just title*, was *a fact alleged* by the petitioner and *denied* by the defendant; and of course *one of the facts* to be decided by the jury. But was ever such proceedings heard of?--As well might it be contended that a *separate jury* could be called to try every *separate fact* at issue, in the cause: for if it can be done to try *one fact*, it can be done to try *one hundred*.

But again, it does not appear that the prescription *was ever tried*, the petitioner claimed the right of

West'n District. *September*, 1820.

PORTER vs. DUCAT.

submitting *the fact of possession* to a jury; the law gives him that right—it was not allowed in the court below and *judgment was rendered*, without this *fact being found*; of course, the judgment is illegal and ought to be set aside.

In this case, the defendant cannot complain of the plea of prescription, on the part of the petitioner, taking him *unprepared at the trial*, for the defendant, *in his answer*, alleges that he, the defendant, had *been in possession of the land for ten years under good title*; which was denied by the petitioner (see second page) so that in fact it was put in issue by the defendant, *who came prepared* to support his plea, and if the petitioner, who was not prepared to prove his possession, until upon trial offered ready to try *that fact*, the defendant cannot complain—and the court certainly erred in not submitting it.

MARTIN, J. delivered the opinion of the court. The object of this suit is the recovery of the possession of a tract of land, from which the plaintiff complains he was wrongfully ousted by the defendant. The latter pleaded the general issue.

At the trial, after the jury were sworn and issues submitted to them, the plaintiff prayed leave to add a plea of prescription, and submit the fact of the alleged posession to the jury. The district court allowed the plea to be entered, but refused to allow the fact of possession to be submitted to the jury; on which a bill of exceptions was taken.

The jury found the issues for the defendant.

The plaintiff moved for a new trial, on the ground of new and material evidence discovered since, which he could not, by ordinary diligence, have discovered before—and on the ground that the verdict was contrary to evidence. He added to his own affidavit that of one W. Johnson, the person who had informed him of the new evidence.

The new trial was refused, and a bill of exceptions was taken.

The district court gave judgment, that the plaintiff be perpetually enjoined from asserting any claim to the premises and pay costs. The plaintiff appealed.

The parties agreed that a statement of facts should be made by the district judge, who promised to do it. Afterwards, being called upon for it, he answered he had lost his notes, and could make no statement.

It appears to us the district court erred, in perpetually enjoining the plaintiff from asserting any right to the premises. It is not clear that a defendant can obtain such an injunction, and, in the present case, it was not prayed for.

It is not the fault of the plaintiff, that the district judge mislaid his notes and was thus unable to make the statement he had promised, and which it was his duty to make; the plaintiff ought not to suffer from an accident which he could not control.

West'n District. September, 1820.

PORTER vs. DUCAT.

If there was any possibility of a statement being made, we would issue a *mandamus*, as we did in the case of *Broussart vs. Trahan's heirs*, 3 *Martin*, 704, in which the district judge neglected to draw a bill of exceptions, which he had engaged to prepare.

With a statement of the evidenc e before the jury, we could ascertain whether the verdict be contrary thereto and whether the district court erred in refusing the new trial.

It certainly erred, in refusing to allow the possession, alleged in the plea of prescription, to be submitted to the jury.

For these reasons, and as it is not clear that the plaintiff could by ordinary diligence have discovered the evidence, mentioned in his affidavit, we are of opinion he ought to be relieved.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled voided and reversed, and that the case be remanded, for a new trial, with directions to the judge to allow the fact of possession to be submitted, and that the defendant and appellee pay the cost of this appeal.

PREVOST'S HEIRS vs. *JOHNSON & AL.*

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

When an usurper enters on land he acquires possession inch by inch, of the part which he occupies.

The possession of one who shews no title, when the extent of it is not shewn to have reached within a mile of the *locus in quo* cannot be considered a possession of it.

Feeding cattle and hogs, cutting wood, building pens, are not necessarily acts of possession of the land—as clearing land, cultivating it, building houses &c.

The purchase of the vendor's *right* only, and a stipulation, that the price shall not be payable till the title be confirmed, are not necessarily presumptions of fraud.

A purchase of land, for the recovery of which no suit is commenced, is not the purchase of a *litigious right.*

APPEAL from the court of the fifth district.

The plaintiffs stated that they are the owners and proprietors of a tract of land, described in the petition, sold in 1780 by V. Lesassier to J. B. Macarty, from whom their ancestor purchased it, the same having been possessed and enjoyed by the plaintiffs and those under whom they claim for thirty years and upwards, and the defendants have, with force and arms, entered on the premises and dispossessed them; they prayed that the defendants might be decreed to deliver and yield possession, pay damages and for general relief.

The defendants pleaded the general issue; alleging their possession for a year and a day, and that of those under whom they claim for thirty years and upwards; that they are the real owners and proprietors of the land, under good titles.

There was judgment for the plaintiffs, and the defendants appealed.

By the statement of facts, the plaintiffs are admitted to be the heirs of N. Prevost, dec'd.

A deed of the widow Lesassier was read on the part of the plaintiffs, in which she declares on oath that, by an instrument under private signature, her said late husband sold to J. B. Macarty (in 1780) with

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

express condition of ratifying the sale, a tract of land of 80 arpens in front, on both sides of the bayou Teche, in the district of Attakapas, at the place vulgarly called the *chicot noir*, the price of which the said Macarty paid down; that by the said instrument, Lesassier engaged to execute a notarial sale, at the requisition of Macarty; which was not done, owing to the destruction of the titles, which were destroyed in the conflagration of 1794: these titles consisting in a grant to Lesassier, and several deeds of exchange with some Acadians, for a tract of land which Lesassier had on the Vermillion; in consequence of which for herself and her heirs, she confirms the sale &c. This deed is executed before a notary, and bears date of the 12, May 1804,

The plaintiffs next introduced Macarty's deed to their ancestor. Also, a petition from Macarty to the intendant of the province of Louisiana, in which he states that the sale, under private signature, of Lesassier for the land in dispute was mislaid in the office of Pedesclaux, and prays that an inquiry may be made, as to his payment of the taxes thereof.—The intendant's order thereon of July 16, 1803.

The deed of the representatives of J. B. Hebert to the defendants of Jan. 26, 1812.

Certain Spanish proceedings to establish the destruction of Macarty's house, his papers &c. in the conflagration of 1794; Macarty's will.

Boute deposed that in 1776, Lesassier made indigo on the west side of the bayou Teche, at the place where Ursin Prevost now lives, about 34 arpens below N, Loisel's lower line, which is opposite the lower line of the defendants' land, upon the other side of the bayou. He believes Lesassier remained there until Macarty went on the land; but the witness was absent from the country, about this time. On his return, in 1779, he still found Lesassier there. Soon after his return, which he believes was in 1780 or 1781, he thinks Macarty removed on the land by sending a white man, three negro men and a woman, to keep a stock farm. He does not know how long it was kept, perhaps five or six years. Macarty had a field enclosed on the west side, where is cabin was, and cut wood on the opposite. There was no wood on the west side; he made a little *pavure* at the water's edge, on each side of the bayou to cross his oxen and haul wood. He made a bridge over the bayou chicot noir, on the west side of the Teche, and about 35 or 40 arpens from the bayou, behind the land on which he had his stock farm, which has ever been called Macarty's bridge. The land remained unoccupied, from the time Macarty removed his stock farm, until Prevost took possession of it, by putting his son in law N. Loisel, on it, on the west side. Lesassier told the witness he had sold both sides of the bayou. The old inhabitants

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

so understood it; Declouet and Sorrel, who are dead, considered the land to belong to Macarty.

Frelot deposed that he has been in the Attakapas for 38 years and lived most of the time, with Boutte. Macarty always claimed the land on both sides of the bayou Teche. When he came to Attakapas, Lesassier was on the land, where he remained one or two years after the arrival of the witness. When he left it, Macarty sent four negroes to keep his stock farm, who remained there four or five years. The land remained without settlement, until Loisel took possession of it, for Prevost. Macarty built a bridge on chicot noir, which was always known by his name. He cut wood on the opposite side, and the witness saw corn growing there one year, in a small uninclosed field, planted by Macarty's negroes. Since he has been in the Attakapas, he has understood Macarty claimed the land on both sides of the bayou, and it was generally understood he owned it.

Carlin deposed he came to the country about forty five years ago. He saw a stock farm of Macarty's on the west side of the bayou, and land cleared on each side and negroes at work. He understood that all on each side, belonged to Macarty.

Pellerin deposed that Loisel arrived on the land, claimed by the plaintiffs, on the west side of the bayou five or six years ago.

Borel at first stated that Loisel and one of the de-

fendants went into possession, about the same time, about five years ago. On the next day, he corrected his testimony, by stating it might be a little sooner.

Decuir, deposed he knew Macarty did all his business and has knowlege of the land claimed, but not of its boundaries. He was once desired by Macarty to measure eighty arpens, on each side of the bayou Teche, at the chicot noir; he did so, on the western bank only, where he found that quantity of land: he did not measure on the eastern bank, because it was covered with wood: he sent the plat to Macarty: he has been an inhabitant of Attakapas for about thirty five years, but does not recollect at what time Macarty came on the land: he recollects to have seen his settlement and stock farm for many years. He does not know that the land belonged to Lesassier and was settled by him: but it is in his knowlege that, for about thirty five or thirty six years, the land in dispute has been considered as the property of Macarty or his heirs. All the old inhabitants of the place told him so; and Sorrel advised the witness to buy it, saying Macarty owned eighty arpens on each side. Under the Spanish government, land was taxed, for public works generally and the premises were so in Macarty's name, having often paid the taxes for Macarty and at his request. Macarty's settlement was on the western side of the Teche.

Judice deposed he has been an inhabitant of the

West'n District. *September*, 1820.

PREVOST'S heirs vs JOHNSON & AL.

Attakapas for thirty nine years and knows the land of Macarty on the bayou Teche, at the chicot noir, but not its boundaries. It belonged to V. Lesassier, but does not know at what period he came on it. The land has been considered as belonging to Macarty for thirty five years past, till the defendants took possession of it. The land was taxed under the Spanish government as Macarty's. V. Lesassier, his wife and the witness arrived together to the Attakapas and Lesassier acquired the land, but his wife disliked the place and Macarty, who was pleased with it, purchased it, in the presence of the witness, who had also been present at the purchase of it by Lesassier. The witness has knowlege that public acts of sale, in both instances, were executed: he believes, but he is not absolutely sure of it, that he subscribed them as a witness. He thinks they were executed before Declouet. On the witness' return from the Mississippi, he saw the enclosures and cabins of Macarty's stock farm, on the western side of the bayou, abandoned—the establishment having been transferred to the Vermillion. He does not positively recollect, but believes Lesassier's purchase of the land was about forty years ago. It is not in the knowlege of the witness how long Macarty occupied the land, but, on his return from the Mississippi, where he was for seven years or thereabout he heard it said that he

had occupied it for three or four years or therabouts.

Delahoussaie deposed that Athanase Hebert, and a person unknown to the witness, came to his father's, and consulted him, as to the suit he was about to institute for the premises, and asked him whether he believed they had a good title thereto; to which his father answered they had none, and that he, Athanase, was old enough to recollect that the land had been exchanged for another, that on the Vermillion. On which Athanase replied that he was very young, yet he recollected it, and that the family had occupied the tract on the Vermillion, that he would have no suit for the land, and he had declined selling it, knowing that he had no right thereto.

Deblanc deposed that Athanase Hebert told him he did not join in the sale of the land, because he was very young at the time: he well recollected that his father exchanged the land with V. Lesassier, for another on the Vermillion—that he had nothing to do with the present suit, that if Johnson failed he was to pay costs, and if he succeeded, account to Hebert's heirs for one half of the price; that he, Athanase, had had nothing to do with the suit, for he had heard that his father had said that the exchange was a verbal one, and he would not disturb Macarty's heirs, as his brother had settled the tract on the Vermillion.—

West'n District. September, 1820.

PREVOST'S heirs vs JOHNSON & AL.

The witness knew long before he came to the Attakapas (20 years ago) that Macarty owned a tract of eighty arpens on each side of bayou Teche, at the place called chicot noir. One Devesin had been advised to purchase it—he never heard that any person had any claim thereon.—The witness was Commandant at the Attakapas and the land was taxed as Macarty's. Macarty had a deed from Lesassier, but the witness believes it was destroyed in the conflagration of 1794. V. Lesassier's deed was recorded at the request of Macarty, thro' the witness, in the United States land office.

Berard deposed that to his knowlege Macarty owned and posessed a tract of eighty arpens in front on each side of the bayou Teche, at the chicot noir, and paid taxes therefor. It was for a considerable time back reputed his property; he cannot tell how long, but a very long time ago. He never heard of any claim from any other person, nor of any adverse possession.—He was syndic as early as 1772, and was in office twenty two years, and as such collected the taxes. He knows that Macarty established a stock farm, but cannot say how long he kept it up.

On his cross examination. the witness declared that he knows that Macarty possessed eighty arpens in front on each side of the bayou Teche, at the chicot noir, because he paid taxes therefor. Land and other property were taxed, and lists were made,

on which every one was inscribed with the amount of the taxes, he was charged with: he knew Macarty had a stock farm, having seen his settlement, negroes and cattle; it was on the west bank.

Porter, for the plaintiffs. It is well known to this court and it is in evidence that, in the year 1794, a fire broke out in New-Orleans, which consumed almost the whole of that city. It was so instantaneous and so rapid in its effects, that Macarty, the ancestor of the immediate vendor of the plaintiffs' ancestor, escaped almost naked, and was not able to save any thing but his life, from the general destruction. All his property, in the city, and papers of every kind, were destroyed: among the latter were necessarily included all his documents and titles for the land he held in the Attakapas. As soon as he had ascertained the extent of the injury he had sustained, he endeavoured to remedy it. The titles, by which he had obtained the premises in question from Lessassier, being under private signature, it became necessary to obtain a formal recognition of their existence. He applied to the widow and representative of Lessassier, who died in the mean while. By a notarial instrument, she recognised the sale, made by her husband to Macarty, of 80 arpens in front on each side of the bayou and confirmed his title. He applied to the intendant in regard to these lands, and mentioned them as his property; in his last will

West'n District. September, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

is a declaration which, as a part of the *res gesta* in the cause, is material.

The general reputation of the country that Macarty, for upwards of thirty years, before the commencement of the present suit, owned the land is proven by Boute, Frelot, Decuir and Berard and it is proven that such was the belief of Declouet and Sorrel, two old inhabitants of the neighbourhood, now dead. His heirs entertaining that belief, sold it *with warranty*, to the ancestor of the plaintiffs, whose right and those of his vendors were so generally and universally understood, that neither their possession or title would, it is presumed, ever have been called in question, had not the defendants bought up a title or grant calling for the premises, dated so far back as 1777, in favor of one Hebert, who, with his family, has resided in the Attakapas ever since, without ever claiming the premises. In their sale to the defendants, Hebert's heirs stipulate that they are to have nothing to do with *any* suit *against Macarty*, and the vendees take care to stipulate that, unless *they* succeed *at law*, they are not to pay any thing for the land. Under this sale, they entered, at a time when the plaintiffs were already in possession of the tract sold them by Macarty, within the limits of which is that so purchased from Hebert, by the defendants.

The length of time, which has elapsed since many of the transactions, to which we are obliged to refer,

took place, the loose manner of conducting business under the Spanish government, resulting from the confidence and good faith which then prevailed in society, and the difficulty of producing proofs of facts so remote, no doubt inspired the defendants with the hope of holding the land. That they were mistaken, and that, as all others who present themselves in a similar shape in a court of justice, they will meet nothing but mortification and defeat, is confidently expected.

We hope to prevail, 1, because we have been in possession for thirty years, before the defendants' entry.

2. Because we shew possession for ten years and upwards, in good faith, and under a just title.

3. Because, after a possession for such a length of time, the court will presume a surrender of the defendants' title, under the circumstances of the case.

4. Because, the defendants have purchased a *litigious* title and the plaintiffs have a right to be subrogated to their right, on payment of what they have stipulated to pay.

I. The thirty years posession is proved by Boutte, who deposed that Macarty entered into possession in 1780 or 1781 and Lesassier had been in possession for four or five years before. Frelot, Decuir and Carlin establish those facts and Frelot adds that Macarty cleared land and planted corn

West'n District. September, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

on the eastern side of the bayou, built a bridge and erected a cabin on the western. He remained there four of five years. Decuir states he was ordered by Macarty to survey 80 arpens on each side of the bayou, he did so on the western side; that he paid taxes on the land for Macarty, which also proved by Berard.

In examining and giving an application of these facts, we shall shew what is posession, according to the jurisprudence of our country—what species of possession may be the basis of prescription.

Reference shall be made only to works of approved authority and no point pressed, beyond what is conscientiously believed to be tenable.

Possession may be defined "the detention of a corporal thing, which we hold in our power by ourselves, or another, who holds it for us and in our name." *Pothier, Possession, n.* 1. "There are two principal kinds of possession, the civil and that merely natural" *id. n.* 6. In order that a possession may be reputed to proceed from a just title, and be consequently a civil possession, the possessor ought produce such a title, or shew that the possession has lasted during such length of time, as will give rise to a presumption that such a title intervened.—We will shew elsewhere, what that time ought to be, *Id.* n. 8.

How is possession acquired?

"In order to acquire possession of things, there must be the will of possessing and the apprehension of, it." *Id* 39. *Aspicimus possessionem corpore et animo, neque per se animo, aut per se corpore. ff.* 41, 2, 3.

The proof brings our case within this description. Macarty had the mind and intention to possess, joined to the actual occupation of the land; since he ordered a survey of it on each side of the bayou, cleared and cultivated land on one, and built a cabin and a bridge on the other. As the enquiry, at this stage is merely as to the *quo animo*, with which he possessed, it is unnecessary to state that parol proof is good to establish it. How, indeed, could it be proven in another way?

How is possession, once acquired, retained? "In order to acquire possession of a thing, will alone does not suffice: there must be a corporal apprehension by us, or some one, who apprehends it for us and in our name, as we have seen *supra*. On the contrary, when we have acquired the possession of a thing, the will which we have to possess it suffices alone, to cause us to keep the possession, altho' we do not retain the thing corporally, by ourselves or others, *Id. n.* 55." Possession being once acquired, the possessor retains it afterwards by the single effect of his intention of maintaining himself in it, joined to the right and liberty of using the thing at

West'n District. *September*, 1820.

PREVOST'S heirs *vs.* JOHNSON & AL.

pleasure; whether he avail himself of this liberty, by using the thing, or leave it untouched. Then we possess not only the land, which we cultivate, and of which we take the crops, but all those which we suffer to lay waste without going thereon, provided we do not suffer others to assume the possession, " *Domat*, 3, 7, 2, *art.* 24 *Id.* 3, 7, 1, *art.* 6 *Licet possessio nudo animo adquiri non possit, tamen solo animo retineri potest. C.* 7, 32. 4. *Quemadmodum nulla possessio adquiri, nisi animo et corpore, potest, ita nulla amittitur nisi in quo utrumque in contrarium actum est. ff.* 41, 2, 8. *Quod vulgo dicitur estivorum hybernorumque saltuum non possessiones animo retineri. In exempli causa didici Proculum dicere: nam ex omnibus prædiis ex quibus non hac mente recidimus et amisisse possesionem vellemus idem est. ff.* 43, 16, 25.

Under these authorities, which might be multiplied to any extent, it is clear that the possession of Macarty and of those who claim under him continued down to the time of the defendants' entry, even if we did not shew a single act of ownership, during the interval. Clearly as this point is established, it will, if possible, by further citations, be made more satisfactory to the court.

This will of retaining possession is always supposed, while no well marked contrary will appears. Therefore, even if a person had abandoned the cul-

ture of his land, he would not for this be presumed to have the will of abandoning the possession of it, he would then be presumed to have the will of retaining it, and he would effectually retain it. *Pothier, Prescription, n. 55, & 56.*

But, the plaintiffs here are not under the necessity of resorting to this presumption of law, altho' it would be sufficient for their purpose. So far from any thing appearing in evidence, to raise a presumption that Macarty intended to abandon the property, there exists every kind of proof, short of that which would result from natural possession, that he retained it. Taxes paid, bills of sale received and confirmed, application with regard to titles from the governor, declarations in the last will, every thing shews that, till the moment of his death, he had the intention of retaining his possession.

As it was objected in the district court that possession, in order to be the basis of presumption, must be natural, we shall first dispose of this point.

As prescriptions were established for the public good, in order that the property of things, and other rights be not always uncertain, he who has acquired the presumption has no need of title, and it stands to him in lieu of one. He, who possessed without title, prescribed at Rome, by thirty years, and after that period he could not be disturbed by the owner. *Domat, 3, 7, 4, art. 2.*

West'n District. *September*, 1820.

PREVOST's heirs vs. JOHNSON & AL.

An objection was made, in the district court, that there was no proof that we had entered into possession of the whole land. On a point so perfectly elementary and so well understood, it is hardly respectful to quote authorities. "I am presumed to have acquired the possession of the whole estate, as soon as I have entered it and set my foot on it, either by myself or some one for me, without it being necessary that either I, or the person sent by me, should go into all the parts which constitute the estate. *Pothier, Possession*, 4, 1, § 2. *ff.* 41, 2, 3, *n* 1.

But, it was said that we proved this by parol only. If this objection be to prevail, the consequences that follow must be that the prescription of thirty years without title will have to be expunged. For, in no case of the kind, the party, who invokes it, may avail himself of it, unless he proves his possession by parol.—Unless he be permitted by evidence of that kind to shew the *quo animo* he entered and possessed, his right would be restrained to the ground he stood on, or that his house covered. It would be absurd that the law should allow a right and deny every possible means of establishing it.

The right, given to the possessor of thirty years, to claim a title by prescription, is founded on a presumption that he had a title and lost it. "When ever the possession is long enough to cause a just

title to be presumed, it is no longer, properly speaking, by virtue of the prescription that the possessor may flatter himself with a sure victory, but by virtue of the title, which his possession causes to be presumed. 6 *D'Aguesseau*, 629, *Ed.* 1769. The same lapse of time causes it to be presumed the possession proceeds from a just title, the memory of which is lost, and the written act containing the evidence of it *mislaid*, *Pothier*, *Prescription*, *n* 172.

Courts of common law proceed on the same principle and decide on the same idea of a lost title, which they presume. *Cowper*, 102. 1 *Bay*, 30, 10, *Johnson*, 380, 2 *Hayw.* 147 1, *Cooke*, 3, 57. *Peters*, 132, 3 *T. R.* 151, 3, *East*, 294, *Phillips' ev.* 119, 2 *T. R.* 159.

If such be the presumption, and these authorities establish it, if without any kind of proof of title, the law raises one, from other circumstances, will the court refuse proof, on support of that presumption? Was it, in virtue of the prescription of ten years, which requires a just title and good faith, we were now contending for the property—if we had lost that title, we could give evidence of its contents. *Domat*, 3, 7, 4, *art.* 15. The prescription of thirty years is founded *on the very suspicion of lost title*, and yet we are told we cannot introduce any evidence of its contents. If we cannot, what is it but saying that the court may decide upon presumption,

West'n District
September, 1820.

PREVOST'S heirs.
vs
JOHNSON & AL.

but shall not fortify that presumption by positive testimony?

On this ground alone, then the plaintiffs rest with confidence their right to introduce parol proof: particularly, as it has been already shewn that to reject it, would be at once to decide that the prescription of thirty years, without title, could never have any operation. But, there is another principle on which its introduction could be supported: a principle, which is supposed to be common to every civilized nation, a principle which pervades the jurisprudence of all, because it flows from the necessities of human affairs and the obligations which justice and good faith create; it is this, that in matters of ancient date, the strict rules of evidence are relaxed, nay abandoned; because a difficulty exists in nineteen cases out of twenty, amounting nearly to an impossibility to comply with them. Hence it is that deeds, of thirty years standing, prove themselves, without calling the subscribingwitnesses or accounting for their absence, that hearsay evidence is resorted to,&c. *Philips' Ev.* 182, 350. 2, *Fonblanque*, 445.

The civil law books, to which we are able to resort, in this western part of the state, are principally elementary. It is owing to this, that it is out of my power to shew the application of the general principle, which exists in that jurisprudence to the same extent, that I am able to do from the reports in England

and our sister states. The principle, however, being once shewn, the court will no doubt hear with pleasure any thing which shews, how enlightened men, warmed to a sense of public utility and private justice, have applied these doctrines, in various cases, and that more particularly on rules of evidence, as from some cause or other (principally from our laws requiring evidence to be given *viva voce*) the English doctrines, *on that subject*, have become nearly incorporated in our jurisprudence. Such civil law books, to which I can resort, which at all touch on the point, go the full length I contend for.

" When proof is to be made of an ancient fact, and of which there are no written proof, nor living witness, if the fact be such that proof of it ought to be received, as *e. g.* if the question be how long such an estate have been in such a family, or at what time a particular work was constructed &c. evidence is received of what has been heard from persons, who were then living and are now dead." *Domat*, 3, 6, 11, *n*, 14.

Febrero, speaking of parol proof, hearsay evidence, general reputation, and in what cases they are admissible, says, in ancient facts, out of the memory of men, they make full proof : in cases of little importance, and those of difficult proof, when adminicules and other presumptions concur, or in the action *de reintegrando*, in order that the dispossessed may be

West'n District. September, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

restored to his estate. *Cinco Juicios*, 3, 1, 8, 6, *n.* 374.

The authorities from the common law books are to the same effect, but more minute in their distinctions, because we have more books to trace the application of the general principle.

In that system, parol and hearsay evidence is admitted to prove whether parcel or not, in questions of prescription to prove general reputation, in questions of pedigree, to establish boundaries, how and in what circumstances and to what extent a party entered into possession, what declarations have been made by a party who claims under title, when a possession of thirty years has been continued in the person who wishes to make proof of these declarations. *Fonblanque*, 449. *Philip's evidence*, 182, 2 *Haywood*, 148, *Buller's N. P.* 294.

This point has been discussed, because we deem it important to shew the general reputation of the country and the various acts of ownership exercised on the property. But, as to the extent to which our rights existed, when we went into possession and the animus with which we entered, we have more than parol proof. We have the bill of sale, or act of confirmation of Madam Lesassier, acknowledging that her husband had originally sold eighty arpens in front, on each side of the bayou, and that she made the conveyance, because the former act under private signature was lost.

Now admitting, for a moment, that Lesassier had no right to sell the property—admitting that it does not give a title to the premises, still as the question is, at this moment, not what right Lesassier had, but whether he conveyed any to Macarty or not, it is evidence to that fact. The sale from Lesassier would be so: a recognitive act from his representative, acknowledging the same fact, must have the same force. *Pothier, Obligation n.* 743,

Take then, the presumption arising from the possession, couple it with the declaration of the witnesses, join all to the bill of sale, and who can doubt that Macarty entered into possession of the land, as owner and possessor of eighty arpens front on each side of the bayou?

II. Madam Lesassier's deed to Macarty is of the 12th of May 1804, at a time when he had possession: it recites and confirms her husband's title. It is a just title.

"We call a just title, a contract, or other act, of a nature to transfer property, by the tradition which is made in consequence of it—So, that if the property be not transferred, it is on account of a want of title in the person, who makes the tradition, and not on account of any defect in the title, in consequence of which the tradition is made." *Pothier, Prescription, n.* 57.

West'n District. September, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

"Those different titles, which have no name, and cause us to acquire the property of things by tradition, which is made to us in consequence of them, when he who makes or consents to the tradition is the owner, are just titles, which, when he is not, give us the right of acquiring those things by usucapion or prescription: usucapion, which is called *usucapio pro se.*" *Id. n.* 76.

Under these authorities the sale of Madam Lesassier is a just title. To make it so, it is not necessary that she should have the property of the thing transferred; for then the party claiming under her would not be under the necessity of pleading prescription; all that is required is, that the title be such, that, should the property have been in her, the sale would have conveyed it to Macarty. From the tenor of the act, it is clear it would.

But, it was objected that we should have shewn her to be the legal representative of her husband, before we could read the deed in evidence. Had it been necessary that could have been easily done: but it was not anticipated such objection would be made, or that, if it made, it could find favor or success. Deeds of this description are always held *prima facie* good, in suits against third parties. If they are permitted to make such an objection, it cannot be seen where it is to stop. In every case where an individual claims property by bill of sale from the heirs

of any person, he will be obliged to shew that the vendors were the heirs, that there were no *other children*, and I suppose, after that they were *not disinherited;* or if the case is that the ancestor inherits and conveys, that to lay ground for reading the deed, you must shew that there were neither descendants nor ascendants alive, at the death of the person from whom the estate was inherited, except the grantor. I have never seen this in practice, nor is it right or just that it should be required: for who knows, if there be other heirs, that they wish to avail themselves of this right, *invito benificium non datur*, *ff.* 50, 17, 69. If they do and contest the act by suit, the question comes fairly to be decided on, and the whole circumstances are gone into. But, how can the validity of a deed be decided on collaterally in a suit between other parties? It savours a little of ridicule for a third party, not only to dispute any right in Lesassier, but also benevolently to take the part of his heirs, to whom he is pleased to give an imaginary existence. The law, it is believed does not sanction such an idea; let it be remembered too that, in this case, every presumption is in favor of the instrument. Macarty would not have trusted the confirmation of his right to such an important piece of property, to the deed of an unauthorised grantor, and, if there were other heirs, they would not have suf-

West'n District. September, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

fered seventeen years to elapse without asserting their claim. The court has already sanctioned the principle contended for in the case of *Martin* vs. *Hall & al.*

III. The deed of the defendants goes nearly the whole length of establishing my third proposition viz. that a surender of the title of the grantee ought to be presumed.

Its features are remarkable, and nearly every line of it is marked by a curious mixture of avarice and good faith, each of which triumphs in turn. The fairest way, however, of examining the subject, is as if the conveyance was in the ordinary mode—as if it offered no cause of suspicion—and then to ascertain whether the tenor and effect of the act weakens or fortifies the conclusions otherwise flowing from the facts of the case.

It has been already observed that one of the principles, on which the law recognizes the right of he who has possessed for thirty years, is that, after such a length of time it is presumed that the party had a title (even of the most solemn kind) which has been lost by time or accident. Numerous authorities have been cited to that effect (*ante*) and a close examination of them will shew that the courts to whom similar cases have been presented, presume a deed from him who claims the property, in favour of the adverse party who had nothing to shew, but a

long possession. This from two grounds: to quiet possession, and because it is probable that the party surrendered his title, or he would not have suffered so long a time to elapse without asserting it.

Long and undisturbed possession of any right or property affords a presumption that it has had a legal foundation, and rather than to disturb men's possessions, even records have been presumed. *Peake's Ev.* 31.

Where a mortgage deed is produced, if the mortgagor never entered, and no interest has been paid for twenty years, courts have uniformly instructed juries to presume a surrender. 3 *Johnson*, 376; 7 *Id.* 283; 12 *Id.* 394; *Bull. N. P.* 110.

In the case of *Patton* vs. *Hynes*, 1 *Cook*, 357, the Circuit Court of the U. S. decided that, after a peaceable possession of land for twenty years, it may be left to the jury to presume, that there was a deed and that it was registered.

So, where M. died in possession of land, and his son and heir at law succeeded to the possession, and continued therein for eighteen years, it was held that a purchase of the land by the ancestor might be presumed. 10 *Johnson*, 377.

These are ordinary cases, surely not so strong as the present. Heberts' patent is of 1777. Can it be supposed that from that time to 1812, if the land had not been sold to Lesassier (as the witnesses prove)

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

he would not, in some mode or manner have taken possession or asserted his right? No tax was ever paid by him, he cannot produce one witness living nor the say so of any man now dead, that during these thirty-five years any right was claimed or any species of ownership on the land exercised. Nor does he attempt to account for the violent presumption thus raised against him, and that too, living within a few miles of the premises. He shews no absence, leaves a silence from thirty to forty years unexplained. Gentlemen may talk of proof by writing and proof by record: but if this be not a full and conclusive proof of a surrender of title, as strong or stronger than either or both of these put together, I must confess I know nothing of what is *evidence:* nor can I conceive what is to make an impression on the human mind, if this does not.

How strongly, too, does the language of Hebert's heirs' sale to the defendants strengthen and fortify this presumption, if indeed it can be strengthened. It presents a curious spectacle of the reluctance, with which they consented to sell that, which they felt they had no right to—of the great doubts and perfect wordly wisdom of the purchasers, who made, as the court will see, a saving bargain, and of the pains which the vendors had, in yielding up their good faith for the *chance* of gaining the purchase money. The act of sale, after stating the parties and

going on to say that the heirs of Hebert sell (not the land) but their right thereto, contains the following clause: "The said conveyance made for and in consideration of 3,500 dollars, payable when the purchasers will be confirmed in the possession of the said tract of land, by the decision of a court of justice, or when the heirs of Macarty will have made an abandonment of their rights and claims to the same. It is well understood among the parties, that all costs arising from the law-suits, with the heirs of Macarty, or any other claimants under Macarty's grant, will be at the risk of the said James Johnson and George Singleton; and if any deed or conveyance shall appear from J. B. Hebert, deceased, for the said tract of land, the present deed and every thing herein shall be null and void, otherwise to remain in full force and virtue, &c."

Now, unless there was something more than common in the circumstances of this case, why adopt such an uncommon mode of making the conveyance, unless they really felt that something might hereafter appear, which they dreaded, and which they hoped, would not perhaps come to light? Why adopt such numerous and severe precautions, and why adopt them all *against Macarty*, and entertain no apprehension from any other source? Any intelligent man can readily give an answer to these queries, and see through the whole transaction. The defendants

West'n District
September, 1820

PREVOST'S heirs
vs
JOHNSON & AL.

thought it was a *good chance* to get a most valuable piece of property, at one fourth of its real price. In making the experiment, they ran no risk of loss. The vendors evidently yielded with reluctance to the temptation thrown in their way. It is a pity they yielded at all. But, in every line can be traced their doubts, pains and anxieties, at what they were doing. Why did they feel them? Who can have any difficulty in giving an answer?

Does not, then, the language of this deed most strongly fortify the presumption otherwise flowing from length of time, and make this one of the clearest cases that can be imagined of a surrender of a title? Let the court take with it the testimony given in the cause, and how will this point stand? Thirty-six years silence on the part of the vendors—a deed couched in the language already stated, and parol evidence to sustain what is otherwise a violent presumption.

IV. Hebert's heirs sell to the defendants all their rights and pretensions to the land—to be paid for, when the decree of a court of justice confirms them in their right to it; and a clause is added, that the costs arising from the law-suit with the heirs of Macarty, shall be at the vendors' expense. Is this a litigious right?

Of its being so to every common intent there can be little doubt. The deed acknowledges a suit to be

commenced, and provides for its consequences. It is in truth the purchase of a law-suit in express terms. Let us examine whether there be any thing in our law that repels the idea.

"A right is said to be litigious, when there exists a suit or consultation on the same. *Cod. Civ.* 368, *art.* 131. Are these expressions *restrictive*, or merely enunciative? We contend that they are *enunciative*: because one great object of the statute would be defeated, if they were regarded in any other light. The object of this statute, as it is plain to every one, was to cut off temptation to those who make it their business to buy up rights at a low rate, that they may succeed in law—to check litigation of this kind, which all civilized nations abhor, by depriving him, who makes such a purchase, of the means of rendering it a matter of profit. This was no doubt the object of the legislator. What other rule of construction can there be applied to it, but that you must so consider and restrain it, as "to repress the mischief and advance the remedy."—A cardinal rule, never to be departed from by courts of justice in construing remedial laws. Now, the cases in which this provision would have a beneficial tendency must be few indeed, if restrained to suits already commenced, because they are seldom the object of traffic, and for this reason: men, who, do not make *trading in law* their means of livelihood, seldom go into court, til

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

after having well considered the nature of their claims and until they are advised that it is such a one as can be supported. After taking this step, they scarcely ever feel inclined to sell under the real value, and contracts for property *pendente lite* are, as is well known, extremely rare. There may be exceptions to what is here asserted, but they are few. On the other hand, it is a great evil to permit men to go round seeking every obsolete claim, hunting out every forgotten or obsolete title, purchasing it for little or nothing, as is the case here, and the instant after they acquire it making it the basis of an expensive and vexatious lawsuit. Independent of the magnitude of this evil, it is one of frequent occurrence, and from its nature calculated to increase to an alarming extent, unless frowned upon and punished whenever the proof of it can be completely made.

There is another consideration, which ought to have considerable weight in the construction of this statute. One of its objects, perhaps the only one, was to prevent litigation. By confining it to *suits commenced*, this object is in a great measure defeated. For, as the suit is begun, before the purchase is made, litigation is not at all checked. The only difference is that it is carried on at the expense of one man, instead of that of another. It is difficult then to conceive that the legislature intended to restrain the provisions of the statute to cases in which the very evil

they wished to eradicate would remain untouched. On the other hand, by applying it to the extent which is here urged, the law is made to reach and destroy the mischief, which the court clearly see the lawgiver had in view.

An objection may be made that this rule of construction would check and embarrass the transfer of property. A little consideration will show that this idea is not tenable. What is contended for here does not reach the case of one buying a piece of property, where one who has an adverse claim may or may not assert his right, or where the vendor would have prosecuted his claim as well as the purchaser. All that is contended for is that it reaches this case. Where positive proof is given that the purchaser is the cause of the litigation, *that he buys a law suit*, and that though those he bought from are willing to sell him the right of action at law, it is clear it is one which they would not exercise themselves. Had the sale been in these words: "we the vendors sell and convey the right of a law suit against Macarty," I suppose no one would contend that it was not a litigious right which the vendees acquired. Yet, let the defendants' deed be examined, even in the most favorable aspect, and it will be seen that in truth they bought nothing else.

In support of this position, the court is referred

West'n District. September. 1820.

PREVOST'S heirs vs. JOHNSON & AL.

to *Pothier, Vente, n.* 583. 15, *Jur. du Code Civ.* 328—345.

At Rome, purchasers of litigious rights were held in such abhorence, that the law refused them an action for the thing thus acquired. *Si contra licitum, litis incertum redemisti, interdictæ conventionis tibi fidem impleri frustra petis. Code.* 4, 35, 20.

Brent, for the defendants. I contend that 1. the plaintiffs, if they recover, must do so, according to the title which they have set forth, viz: a deed from V. Lesassier, in 1780—this they have failed to prove.

2. The deed of Mad. Lesassier is no evidence of that of V. Lesassier, and ought not to have been received in evidence.

3. The petition states that the premises were sold in 1780 to V. Lesassier, by him to J. B. Macarty, from whose heirs they were purchased by the plaintiffs. Therefore, before they recover they must show, by legal evidence, that the land was sold by V. Lesassier to Macarty. The legal evidence is the best which the nature of the case admits of: in the present case, the production of the original deed from Lesassier. Their omission of doing so leaves them under the imputation of withholding a document, which, if produced, would be evidence against them. *Lucile* vs. *Toustin*, 5 *Martin*, 613.

They urge that this deed was once under private

signature, that it is lost, and consequently they may give evidence of its contents. If this were true, it would not be controverted: but in order to avail themselves of it, the yought to have stated it; as they did not, the court will not permit them to take us by surprise.

But, admitting, that this may be proven without having been pleaded, to the general rule that no such evidence shall be received of the contents of a deed, there is, indeed, an exception, when the deed is lost. *Civ. Code*, 312, *art.* 247. 2, *Pothier*, *Obligations*, *n.* 847 *and* 815. Are the plaintiffs within this exception?

Madam Lesassier's deed furnishes the only evidence on record, that the deed of her husband to Macarty, was under his private signature; but she does not say it was lost in the conflagration of New-Orleans, in 1794. She says that by the said deed her husband bound himself to execute an authentic act on request, which was never done, owing to the destruction of the titles, burnt in the conflagration of 1794: which titles were a grant for a parcel of the land, and deeds of exchange with several Acadians, for the rest.

But the introduction of the deed of Madam Lesassier was opposed, and ought not to have been received. It is true it is sworn to, but, it is a voluntary affidavit, made *ex parte*, and which cannot be used

West'n District. *September*, 1820.

PREVOST'S heirs *vs.* JOHNSON & AL.

against the defendants, as neither them nor any person, under whom they claim, were present, nor have they ever had an opportunity of cross-examining the deponent.

In neither of the other documents do we find any legal proof, that the deed, under the private signature of Lesassier to Macarty, ever existed, nor of its loss, nor of the fortuitous event which occasioned this loss.

The plaintiffs, on this point, are not more fortunate, in their attempt to establish this deed by witnesses. None of them can say any thing positive, with regard to its existence or loss. Deblanc has heard or believes it was lost in the conflagration of New-Orleans, in 1794; but the gentleman does not inform us how he heard of it, or why he believes it—whether he heard it from Macarty, or believes it from the petition of Macarty to the intendant, and the proceedings had thereon.

I lay it down, as an incontestible principle, that, before the contents of an instrument may be proved by witnesses, the court must be satisfied of its former existence, and its loss or destruction. *Civ. Code*, 312, *art.* 147. 2 *Pothier, Obligations, n.* 815. Admitting, however, all this to have been satisfactorily proven, the witnesses who depose, as to the contents of the instrument alleged to have been lost or destroyed, can only be persons who have had it in their hands, and are well acquainted with the handwriting

of him, who executed it, or who had a particular knowlege of the fact or contract of which it was intended to be the proof. It is, therefore, clear that, in the present case, the court cannot listen to the testimony of persons, who declare that they have heard and believe that Lesassier sold the land in dispute to Macarty.

The plaintiffs, however, rely on the deed of Madam Lesassier. This instrument was executed in 1804, and, as is there stated, after Lesassier's death. The introduction of this paper as evidence was opposed, and a bill of exceptions was taken to the opinion of the court, in admitting it.

This instrument contains the declaration on oath of that lady, that a deed under the private signature of Lesassier, her husband, was given in 1780, to Macarty. She swears, indeed, to all the other facts which the plaintiffs allege in support of their title.

Farther, the defendants had a right to resist the introduction of this piece of evidence, on the ground that it took them by surprise, inasmuch as the facts thereby disclosed, were not alleged. The plaintiffs claimed under a deed from Vincent Lesassier to Macarty, in 1780, and a possession of thirty years. These facts were denied and put at issue by the defendants, who also set up a better title. They came prepared with testimony to disprove the facts so al-

West'n District. *September*, 1820

PREVOST'S heirs. *vs* JOHNSON & AL.

leged by the plaintiffs. Most undoubtedly, then, the introduction of another title, not made in 1780, but in 1804, not executed by Vincent Lesassier, but by Madam Lesassier, his widow, took them by surprise, as nothing in the pleadings could lead them to the belief, that the plaintiffs relied on this latter deed.

Again, Madam Lesassier sells and warrants the premises to Macarty. Admitting, therefore, that her deposition, contained in this deed and sworn to, was regularly taken, in the presence of the defendants, still they could refuse its introduction, as the evidence of an interested person.

Let us now examine this instrument, as a deed conveying a title to the land, not as a deposition of a witness.

It is not shown that Lesassier was dead when it was executed—nor even that the person executing it was his widow—nor whether he died testate or intestate, with or without issue—whether his heirs were of age or minors, single or married women. She mentions, indeed, in the deed, that her husband left heirs, and that she sells and warrants the premises, for herself and them. Of her capacity to do so, we are not informed by her nor by the plaintiffs.

Will it be contended that a community of gains existed between her and her husband, that the land was acquired during her coverture and consequently she had a right to one half of it, and her deed is

good therefore? But from whence is it concluded that the land was purchased during the coverture: we have not been favored with the date of its execution. In admitting this sale of one half of Lesassier's tract to Macarty I would not put my clients' rights in much jeopardy, for it does not appear that the moiety of the widow embraced the premises in dispute. It is rather to be supposed that Macarty considered himself as the purchaser of one half of Lesassier's tract, as he declares in his will that he owns eighty arpens of land, in front, on the river Teche, in the Attakapas, and the parties have agreed, in the statement of facts, that the plaintiffs are not entitled to recover, unless they show a title to eighty arpens on the *east* side of the Teche; and all the testimony fixes Macarty, and the plaintiffs afterwards, on the *west* side, where he had his cattle farm.

The plaintiffs first claim the land under the prescription of thirty years.

In this respect, they cannot avail themselves of the possession of Lesassier; as neither he nor his heirs are shown to have transferred their rights: but could they join Lesassier's possession to their own, I am ready to prove that the defendants and those under whom they claim, have possessed the premises, from the date of the original grant, in 1777, to the present day. They are now, and were when the present suit

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

was instituted, the actual possessors of the land. In order to establish this fact, I refer the court to the statement, where it appears, under the hands of the parties, that the defendants went into possession in 1812, and the present suit was not instituted till the 15th of October, 1815. Accordingly, their possession was undisturbed during nearly four years: a sufficient time to cause them to be considered as *legal possessors. Civ. Code*, 478, *art.* 22, 24.

In the original grant, in 1777, the Spanish governor certified that J. B. Hebert had been put in possession of the *locus in quo*, and the statement shows the purchase of it by the defendants, from Hebert's heirs.

The actual possessor, when he proves that he has formerly been in possession, shall be presumed also to have been in possession, during the intermediate time, till the contrary be proven. *Civ. Code*, 484, *art.* 142.

Some of the witnesses examined disprove the possession of the defendants, or those under whom they claim, since 1777. They declare that neither the plaintiffs, nor those under whom the claim, were ever actually possessed of the land, and that they always resided on the *opposite* side of the river, at the distance of thirty-four arpens, more than a mile, below a line drawn opposite to, and in continuation of, the defendant's lower line.

One or two witnesses state that Macarty crossed the river to get fire-wood; that he cut it two arpens below the *locus in quo*.

If the defendants, or those under whom they claim, had possessed the land from the year 1777, the date of the original grant, to the year 1815, that of the institution of the suit, a period of thirty-eight years, how can the plaintiffs recover it under the prescription of thirty years (if they have shown it, which we deny) of a spot of ground, on the opposite side of the river, upwards of a mile farther down?

But, the plaintiffs contend that Macarty having made a settlement, and said he owned eighty arpens in front, on each side of the bayou, and it being sworn that such was the report in the neighbourhood, his possession of a small spot, on the west side of the bayou, was a constructive possession of the whole tract, now claimed under him. What an extraordinary doctrine! Suppose that Macarty or Lesassier, when they settled *there*, had declared that they owned the land, on both sides of the Teche, for ten miles, and the witnesses to-day should swear, that *they heard it said*, that either of these gentlemen, or both of them, owned the land for that distance, would the court extend their possession, so as to deprive a man of his land, holden under possession and grant, at the extreme end of the ten miles? Yet this doc-

West'n District. September, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

trine would so extend it. It is out of all reason, at war with justice, and in opposition to the law.

The plaintiffs' counsel has referred to the *Treatise on Possession*, to support this doctrine. The law there laid down is intended for a very different case. Pothier says, "it is so with regard to him, who acquires an estate, which the former possessor willingly abandons to him." Suppose a title or not, in the former possessor, who before occupied the land, as he possessed it, it is not necessary that he who afterwards acquires it should enter on every part of it: the possession of a part sufficing. But it is necessary, in such a case, that the possession of the whole should once have been in the former possessor, without title: for he cannot transfer more than he possessed. In the present case, if the plaintiffs hold under Lesassier (which is denied) it is proved that he (if he be considered as the former possessor) never possessed the *locus in quo*. If Macarty be considered as such, it is proved that he never possessed it. But, the real, and only former possessor, was J. B. Hebert, with whose consent, or that of his representatives, the plaintiffs never possessed it.

But, it never was understood *generally* in the country that Macarty claimed eighty arpens, on both sides.

It is true that the plaintiffs have introduced *four* witnesses, who, all of them, state themselves Macar-

ty's intimate friends, and swear that they heard him and others say that he owned eighty arpens on each side: but *three* other, old and respectable witnesses, swear they never heard that he owned that quantity of land.

Judice says he was present when Lesassier bought the land at Chicot-noir, and that he bought only thirty or forty arpens, on the west side, and, at the same time he sold to Macarty; that he was a witness to the two sales, both of which were made by *authentic acts*, passed before Declouet. This witness was introduced by the plaintiffs, and he proves that Lesassier's deed to Macarty was an *authentic* one, and therefore not *under private signature*, and for land on the west side of the bayou, only.

Gonsoulin and Dugat say they always heard and understood he owned and claimed eighty arpens on *one* side of the bayou only. It may not be improper to remind the court, that Gonsoulin was the regular surveyor of the Attakapas, under the Spanish government, and had a perfect knowledge of land tracts, in that district.

The testimony of Berard can be of but little avail to the plaintiffs. It appears that this aged gentleman has not a very perfect recollection of the facts he narrates. His deposition was taken twice, and the last time, he states positively the contrary of what he had declared the first.

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

The plaintiffs' counsel urges that *four* witnesses deposing in opposition to *three*, the former ought to prevail. This, as a general rule, is cheerfully admitted, but the contrary one must prevail, when the court seeks to ascertain the general belief and understanding of a neighbourhood. But the matter does not rest on parole evidence only.

Macarty, in his last will, declares that he has a tract of land of forty arpens of front, on the bayou Teche, at the place called Chicot-noir. What better proof could be produced? The vendor of the plaintiffs' ancestor, in his last will, which they have read in evidence, declares he owns a tract of *eighty* arpens on the Teche. Had he owned a front of *one hundred and sixty*, or of eighty on both sides, would he have expressed himself thus? The contrary appears in the next line of his will, where he speaks of a tract of eighty arpens, *on both sides* of the Vermillion, which he describes thus: "one of *one hundred and sixty* arpens of front, on the Vermillion, at the place called La Prairie Sorrel."

Let the court take these *written* declarations of Macarty, more certain than the floating, idle report of the neighbourhood, join them to the testimony of Gonsoulin, the surveyor, and that of Judice and Dugat, and the conclusion is irresistible.

The just title which the plaintiffs present as a

basis of the prescription of ten years, is the notarial act executed by Lesassier's widow, in 1804. Within seven years and eight months after its date, according to the statement of facts, the defendants took actual possession of the land in dispute. The plaintiffs have not shown that they possessed under any other just title: for I have clearly demonstrated that there has been *no proof* of any deed from Lesassier to Macarty, in 1780, for a tract of eighty arpens on both sides of the Teche—that the only certain testimony of the existence of a deed, is that of Judice, who swears that he was a subscribing witness to one which was an authentic act, and for eighty arpens on the west side of the bayou only. Why is not this act produced?

But, suppose it had been proven that a deed had been made by V. Lesassier to J. B. Macarty, in 1780, for the land on both sides of the bayou, there is no proof of the *locus in quo* ever having been in the possession of Macarty, his heirs, or the plaintiffs: on the contrary, I have shown that the defendants have been in possession of it since the year 1777, and according to law, are now the actual possessors. *Civ. Code*, 434, *art.* 42. Even supposing that the plaintiffs have, with a just title, been in possession of a part of the land deeded to them, still if the defendants, or those under whom they claim, have, *at the same time*, and in good faith and a just title, pos-

West'n District/ *September*, 1820

PREVOST'S heirs vs JOHNSON & AL.

sessed the *locus in quo*, the plaintiffs' possession could never extend to the land of the defendants. For, it is a clear principle in law and in reason, that two persons, under opposite titles, cannot possess at the same time: and, even if they could, the court would support the possession of him who had the best title.

Here, the plaintiffs show no original title whatever. The defendants show a complete Spanish title and actual possession under it, in 1777, a confirmation of their right by the commissioners of the United States, and actual possession at the time of the institution of the present suit.

The counsel urges that the court will presume a deed from J. B. Hebert, under whom we claim, to the plaintiffs, or those under whom they claim.

The counsel argues as if it was in proof that the defendants land, the *locus in quo*, had been in the possession of the plaintiffs or those under whom they claim, for thirty years before the possession of the defendants commenced. In such a case, the authorities quoted might have some bearing. But it has been proven, that no other person, except the defendants, or those under whom they claim, ever had the possession.

Without examining the cases cited, and to save time, I will make but one observation on them. The

court will perceive from a perusal of the authorities of the plaintiffs, that they relate to cases in which the land is in the possession of, or has been possessed by the party, which is not the fact here.

Remarks have been made on the deed of Hebert's heirs to the defendants, and it is intimated it ought to be viewed with a suspicious eye.

It is in the usual form. The caution of the vendors to avoid a law suit is manifest. Honesty and good faith influenced them. They are honest but ignorant persons. They had understood the land was claimed by Macarty's heirs, under a grant to him, and by purchase from their ancestors: this appears from the deed. When the defendants offered to purchase the land, they informed them that they would gladly sell, but as they understood that Macarty's heirs claimed the land, and they had no knowledge of the nature of the claim, they would not convey, so as to render themselves answerable for any expenses attendant on a law suit: and if Macarty, as was said, had a deed for the land from their father, they would not sell. The defendants proposed a conditional purchase, viz. that the payment of the price should be deferred, till the right of the vendors was established in a court of justice. Their offer was accepted. All this is gathered from the surface of the deed.

It is contended that a deed from J. B. Hebert is to

West'n District. September, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

be presumed from a clause in the deed which provides for its nullity, should any deed appear from Hebert for the land.

The good faith and honesty, which dictated this clause, show clearly that the vendors did not believe that any such a deed was given. But, as they were young, and there was a possibility of a deed having been executed under the private signiture of their father, they provided for this possible case.

Lastly, we have the definition of a litigious right in our statute. A right is said to be litigious, when there exists a suit and contestation for the same.—*Civ. Code*, 368, *art.* 131: but this does not apply, when the sale has been made to the possessor of the inheritance, subject to the litigious right. *Id. art.* 132.

At the date of this deed, January 26, 1813, no suit existed: the present one having been instituted on the 15th of October, 1815. But the expressions of the code are not *restrictive*, but merely *enunciative*.

If the code had gone no farther than the 130th article, which provides that he, against whom a litigious right has been transferred, may beget himself released, by paying the real price of the transfer, the court might have determined that the term *litigious* right was enunciative. But, in the next article, the

legislature defines what is meant by a litigious right. Should the doctrine contended for, in this case, be correct, there would be no security in purchasing property, to which another man may have a claim although a bad one. The law with respect to litigious rights, as relied upon, has no relation to cases like the present, where a purchase of land is made.—It relates only to cases in which an uncertain right is in litigation, and where a small consideration is paid. Certainly, it never was, nor can it be ever contemplated, that because a person sets up an unfounded right to the land of A, and B purchases it, knowing that a claim is made thereto, B is the purchaser of a litigious right. The recognition of such a principle would avoid a considerable portion of the sales of land in this state.

The statute expressly provides that, where a litigious right is sold to the possessor of the land, subject to it, the vendee shall not be obliged to yield his purchase. *Civ. Code*, 368, *art.* 132. In this case, supposing that the right purchased was a litigious one, the defendants, who purchased it, were the possessors of the land, at the time, and, of course, under the positive presumption of our law, not liable to be compelled to yield it.

To show that the defendants were the possessors, at the time of the purchase, it will suffice to refer

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

the court to the date of the deed, which is the 26th of January, 1813, and to the statement of facts, which shows that they had moved upon the land, in the beginning of 1812, and of course had been in possession almost thirteen months, a time sufficiently long to cause them to be considered the legal possessors. *Civ. Code*, 478, *art.* 23.

Farther, admitting the defendants to have really purchased a litigious right, this circumstance could not avail the plaintiffs. For, they have not alleged it, and have not prayed, in any part of the petition, to be allowed any benefit from it.

MARTIN, J. delivered the opinion of the court. The plaintiffs rely on a possession of thirty years—a possession of ten years with a just title—the presumption of the surrender of the title of the original grantee—and a right of being substituted to the right of the defendants, on a suggestion that they purchased a litigious one.

I. The plaintiffs cannot avail themselves of Lesassier's possession. There is not any *legal* evidence of his having transferred any right of his. One of the plaintiffs' witnesses, Judice, deposes that Macarty had an *authentic* title from Lesassier. None is produced, neither is there any legal evidence of the loss or destruction of such a title, nor of its contents,

The plaintiffs' counsel urges that it was a *private* one, and was burnt in the conflagration of Macarty's house, in 1794. The *testimonial* or procedure made by Macarty, after the conflagration, is an *ex parte* proceeding, but as it has been read without objections, has been considered by the court. The conflagration is thereby proved, but not a word is there said of the sale to Lesassier, nor of Lesassier's to Macarty, nor of the original conveyances, though many papers of infinitely less importance are there detailed, with great minuteness. In the petition presented by Macarty to the intendant, in 1803, nine years after the conflagration, the sale from V. Lesassier to Macarty is spoken of as a *private* one, which was mislaid, *extraviado*, in a notary's office, and the original titles for the land, which Macarty says had been delivered to him by Lesassier, are said to have been destroyed in the conflagration of his house. Yet, the original title to the premises, the grant from the Spanish government, does not appear ever to have been out of the possession of the grantee or his successors, and is annexed to the record. Neither is there any *legal* evidence that Lesassier ever possessed any land on the eastern side of the bayou, the side on which is the *locus in quo*, except the declaration of Boutte that Lesassier had told him he had sold to Macarty eighty arpens on each side of the bayou. Judice has sworn he was present when Lesassier purchased the

West'n District
September, 1820.

PREVOST'S heirs
vs
JOHNSON & AL.

land of Chicot-noir, on the *western* side of bayou Teche. Delahoussaye, the Chevalier of that name, and Deblanc, have sworn to conversations, in which Athanase Hebert, the son of J. B. Hebert, the grantee of the *locus in quo*, told them the latter had given the *locus in quo* to Lesassier in exchange for a tract on the Vermillion—but these conversations are of a modern date, were posterior to the purchase of the defendants. Athanase Hebert is not shown to be either dead or absent, and no efforts have been made to procure his attendance in the district court.

We conclude that although the declaration of Lesassier to Boutte, now dead, which was made a great many years ago, at a time when it does not appear to have had any interest to misrepresent, might perhaps be received in a case of prescription and boundaries, yet, as in the present case, it is sworn by a witness that the sale of V. Lesassier to J. B. Macarty was a public one—and the private one spoken of by Macarty is said to have been *mislaid* by Macarty himself, and by him alone, parole evidence cannot be received of the contents of that instrument.

The possession of the *locus in quo* by Macarty is attempted to be established by showing that he had a stock farm on the opposite side of the bayou, and cut wood, made a clearing, and planted corn on the other: that the general reputation and understanding of the neighbourhood was that he owned eighty ar-

pens on each side, and that he was taxed, and paid the impositions accordingly.

1. The stock farm is sworn to have been on the western side, below, and at the distance of more than a mile (34 arpens) from the lower line of the *locus in quo*, which lies on the opposite western side.

It is shown that Macarty cut wood on the eastern side, opposite to the stock farm, and that his negroes one year, planted corn, in an unenclosed field, and that small logs were laid along the margin of the bayou to facilitate the passage across of the oxen which hauled the wood. The stock farm was kept from 5 to 6 years—that is to say from 1780 to 1786, and no actual occupation of any part of the whole tract claimed by Macarty appears to have been taken till 1809 or 1810, when the present plaintiffs made a settlement, on the western side of the bayou, opposite to the *locus in quo*. Is this such a possession in Macarty of the *locus in quo* as may be the basis of the prescription of thirty years?

It is contended that the establishment of the farm, on the western side, the cutting of wood, the clearing and cultivation of land on the eastern, were acts of ownership, exercised by Macarty, over a tract of eighty arpens on each side of the bayou, of which Macarty claimed the property, and the statement of facts shows, that if the plaintiffs are entitled to reco-

West'n District. *September*, 1820

PREVOST'S heirs. vs JOHNSON & AL.

ver eighty arpens, on the eastern side, the *locus in quo* is included therein.

It is true that the possession of an estate is taken by entering on any part of it, and there is not any necessity of the party going into every part—but this is to be intended of a person taking possession of an estate, which the former possessor is willing to abandon to him. *Pothier, Poss. et Pres. n.* And if Macarty was proven to have purchased the tract of eighty arpens on each side of the bayou, which is claimed, from a person who possessed it before the sale, and was willing to abandon it to him, these acts would afford abundant evidence of a taking possession of the whole tract.

But it is different when a usurper enters, *vi et armis*, and drives away the possessor: he acquires possession inch by inch only, of the part of the estate, which he occupies. *Pothier, loco citato.*—*Si cum magna vi ingressus est exercitus, eam tantummodo partem quam intraverit, obtinet, ff. l.* 18 *de acq. poss.*

Is it otherwise as to the intruder who enters without force—or in an homely, but expressive term, a squatter? When a person claims by possession alone, without showing any title, he must show an *adverse* possession by *enclosures*, and his claim will not extend *beyond* such enclosures. Nothing can exclude the right owner from his general possession,

or operate in derogation of his right, but acts of ownership, done by the intruder, which unequivocally shows a claim of title in opposition by an adversary to the rightful owner, and such as necessarily excludes him from enjoying and participating in the advantages derived from the possession. *Harris and M'Henry*, 622. The possession of an integral part of a whole, does not include that of the other parts. So, he who possesses only one half of an estate, susceptible of division, will prescribe as to that half only. *Tantum prescriptum quantum possessum.*—*La Porte, des Prescriptions*, 48.

Macarty's possession, the extent of which is not shown, while it did not reach the lowest line of the *locus in quo*, and does not appear to be within a mile of that line, cannot be considered as the possession of the *locus in quo*, or any part of it.

Neither is it very clear that the possession shown, is of such a *nature* as to be the basis of the prescription of 30 years. Wood was cut, corn planted, all in a small unenclosed field, by Macarty's negroes—according to a witness—another saw wood cut, a clearing, and negroes at work. It is not likely that the last witness speaks of what is deposed by the first. In *Grant* vs. *Wimburne*, the supreme court of North Carolina held that feeding of hogs or cattle, building of hog-pens, cutting wood off the land, may be done so secretly that the neighbourhood may not take no-

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

tice of it, and if they should, such facts do not prove an adverse claim, as these are all acts of trespass.—Whereas, when a settlement is made on the land, houses erected, fields cleared and cultivated, and the party openly continues in possession, such acts admit of no other construction than this, that the possessor means to claim the land as his own. 2 *Hayw.* 57.

Neither do these alleged acts of ownership, clearly appear to have been exercised early enough to be evidence of a possession of thirty years. The statement of facts shows the entry of the defendants in the early part of 1812. These acts cannot therefore avail, unless they were exercised in the early part of 1782. The testimony is, that Macarty came on the land on which Lesassier had an indigo farm, viz: on the western side of the bayou, in 1780 or 1781. The time at which he began to cut wood, at which his negroes planted corn in the unenclosed field, &c. is not specified—though, perhaps, as it is sworn there was no wood on the eastern side, the want of that article must have been felt early, and the cutting of wood could not have been delayed long.

Upon the whole, we are of opinion, admitting the alleged acts of ownership, shown to be of such a nature and of so early a date as to avail the plaintiffs, they are unavailable, on account of the *place*—that the occupation of the particular spot on which they were ex-

ercised, cannot be considered as *adverse* to the rights of J. B. Herbert, the owner of the *locus in quo*, distant near a mile. It did not exclude him from enjoying any of the advantages which he did or could derive, as possessor of the *locus in quo*. Prescription takes place only when the owner neglects to claim, when he has it in his power so to do. *Part.* 3, 29, 1. The acts of Macarty were not such as Hebert could have successfully opposed. Surely, while Macarty kept within a mile from the *locus in quo*, Hebert required no legal proceeding on his part to protect his title.

2. The general understanding and reputation in the neighbourhood—the declarations of Declouet and Sorrel, that Macarty was the owner of eighty arpens in front on each side of the bayou, may perhaps be evidence of a title, but are surely not so of his possession.

3. Evidence that Macarty was taxed for the public works and charges of the district, as owner of 80 arpens of front on each side of the bayou, would *prima facie* establish his possession. *Pothier, Poss. Pres.* But this evidence must be *legal*. Now, these taxes were not laid *orally*. We should presume, if the plaintiffs had not proved it, that there were *written documents* establishing them. Berard says lists were made containing the names of each planter

West'n District. September, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

charged, with the amount of the imposition of each. Does it suffice to say, that under the Spanish government, the public papers in the archives of distant districts, were loosely kept and carelessly preserved, without evidence of the least inquiry or effort to procure a copy of such lists? If so, under the American government, which had lasted twelve years, at the inception of the suit, we know evidence of the assessment of taxes can be easily obtained. We, therefore, conclude, that while the literal *evidence* of the impositions is neither produced or accounted for, *parol* proof cannot avail.

But a written evidence is said to exist in Deblanc's certificate, obtained by Macarty, on his petition to the intendant. This certificate is torn and truncated, has ever been in Macarty's possession, or that of his successors, and is produced by them.—Admitting that we can discover from it, that Macarty owned a quantity of land in the Attakapas, and among others, the eighty arpens in front on each side of the bayou, now claimed, and that it appears by the accounts of Duclosange, the treasurer, *Depositario*, of the district, that he has always, *siempre*, paid the taxes, this certificate, given in 1803, while Deblanc, the commandant of the Attakapas, was accidentally in New-Orleans, cannot be accepted as evidence, that as early as 1782, twenty-one years before, Macarty was imposed for the tract in question,

especially when it is in evidence, that Deblanc did not come to the Attakapas till 1796. We have here the certificate of a certificate—admitting all this to be correct, as the document has not been excepted to, we are of opinion, that the word always, *siempre*, although general enough, is too indefinite, and insufficient to show what must strictly and precisely be proven, an imposition for taxes as early as the beginning of the year 1782.

Payment of taxes is spoken of by Decuir and other witnesses. Admitting that such payment was made, without taking a receipt, and therefore is susceptible of being proven by parol, the precise time is not shown. Decuir says he paid, *at divers times*, at Macarty's request—none of the other witnesses show any precise time of payment.

We conclude, that the possession of the *locus in quo* by Macarty, if shown, is not traced so far back as the beginning of the year 1782—and that therefore a possession of thirty years, before the beginning of the year 1812, is not proven.

II. Madam Lesassier's deed being of the 12th May, 1804, admitting it to be a just title, the possession under it had lasted about eight years only, when it was disturbed by the defendants' entry, in 1812.

III. Strong presumptive evidence that the title

West'n District. *September*, 1820.

PREVOST'S heirs *vs.* JOHNSON & AL.

under which the defendants claim, was surrendered is said to be discoverable in their deed. They purchased not the *land* itself, but their vendor's *right* thereto—the price is the fourth part of the value of the land—it is not payable till the title be confirmed by a decree, or the heirs of Macarty's claim be abandoned—the deed is to be void if a deed from their vendor's ancestor to Macarty makes its appearance—no payment of taxes is shown—no occupation of the land appears from 1777 to 1812—there has been a silence of 36 years.

1. A right or claim may fairly be the *object* of a sale. *Pothier, Vente*, 550.

2. We have no evidence of the value of the *locus in quo* at the time of the sale: but we are shown that the plaintiffs' ancestor purchased the whole tract which they claim, on the 5th of June, 1809, for $20,000. This appears by the deed of sale. The defendants purchased the *locus in quo*, containing the eighth part of the tract, for $3,500, Jan. 6, 1813, thirty-one months after. According to the price paid for the whole tract, the *locus in quo* being the eighth part of it, was worth $2,500, in 1809. Now, without any other evidence, we cannot presume fraud, or that it was purchased below its value, when about three years and a half after, $3,500 were given for it.

3. While, as the plaintiffs' counsel strenuously con-

tends, the general understanding of the neighbourhood was, that the *locus in quo*, the premises sold, made part of a tract owned by Macarty, we cannot consider the precaution taken by the vendees, that the stipulated price, which appears to be the fair and full value of the land, should not be paid, till it appeared that those, who were to receive it, had power to transfer the land. The vendors had a complete patent—it is annexed to the record. Their title, therefore, was indisputable, unless a person appeared to have gained it by possession, or they or their ancestors had done some act to defeat it. Yet, the plaintiffs claimed the land, under a deed from Macarty's heirs. Macarty's claim was the only one to be guarded against: as it did not arise by possession, it must do so by title. This title could only be a deed from Hebert. Surely *nimia precautio fraus*; but it was not an extraordinary precaution to guard against the appearance in evidence of a deed from Hebert to Macarty.

4. Hebert and his heirs had a complete patent, since the year 1777—it had been confirmed by the commissioners of the United States on the 27th of August, 1811. According to the statement, the defendants, who certainly did not claim the land under Macarty, as the plaintiffs, entered on it in 1812, and settled opposite the spot on the other side of the bayou, on which the plaintiffs had their settlement, undisturbed and unopposed by them. The pre-

West'n District. *September*, 1820

PREVOST'S heirs. vs JOHNSON & AL.

sumption is strong, as they did not claim title, they entered under the heirs of Hebert, whose title they purchased on the 26th of January, 1813, and remained undisturbed till the 15th of October, 1815. Now, if notwithstanding this, the absence of any evidence of any other actual occupation renders their title suspicious, may not equal suspicion be attached to the plaintiffs' title, who never to this day, by themselves or their predecessors, had any actual occupation? After producing the original grant, proving the descent of the estate to their vendors, their deed and the possession of the defendants, was there any necessity that they should prove that those under whom they claim had been charged with the taxes of the district?

We really see no reason to *presume* a surrender of title. Violent, indeed, must be the presumption, which would induce us to do so, against a possessor with a complete chain of titles.

IV. The right purchased by the defendants is said to be a *litigious* one, although no suit was ever instituted for the recovery of the premises.

In the case of *Morgan* vs. *Livingston & al.* 6 *Martin*, the defendants resisted the plaintiff's claim, on the ground that he had purchased a *litigious* right, having purchased from P. Bailly, a lot on the batture, which was at the time of the purchase, claimed by the

defendants, who were in possession of it. This court decided the vendor's was not a litigious right. Yet, in few cases could it be more obvious, that the defendants would not give up their possession without some legal struggle. We cited no authority, being of opinion that the expressions of the statute were too plain to admit of a doubt.

We are not left to ascertain the meaning of the expression *litigious* right, by a reference either to the opinions of commentators or the decissions of courts. The law itself has expressly given us its meaning: "A right is said to be litigious whenever there exists a suit, and *contestation* on the same." *Code Civ.* 361, *art.* 131.

It seems that a suit brought does not *alone* suffice—that it is not enough that there should be a petition, that a copy of it and a citation should be served on the defendant—it is necessary there should be an *answer*—perhaps any plea will not suffice. In the words of the statute, there must be a contestation. Now, if the advancement and progress of the suit to the contestation be essential, how can it be held that the *inception* of the suit is unnecessary?

If authorities be wanted on so plain a point, we refer the student to the commentary of Gregorio Lopez, on the *Part.* 3, 7, 13, who observes that it had been doubted whether the thing be litigious, before the service of the petition, and he concludes that it is

West'n District. *September*, 1820.

PREVOST'S heirs vs. JOHNSON & AL.

not so—that it was not before the *partida*, and it has introduced no change. *Febrero de escr. ch.* 7, *n.* 9.

It was so in Rome. *Litigiosa res est de cujus dominii causa movetur inter possessorem et petitorem, judiciaria conventione, vel principi precibus oblatis et judici insinuatis et per eum futuro reo cognitis. C.* 8, 37, 1. *Auth. Litigiosa, Nov.* 112, *c.* 1.

The French text of our code civil is a literal copy of the *art.* 1700 of the code Napoleon, and in the case of *Delaunai* vs. *Delanci*, the court of appeals, in affirming the judgment of the tribunal of Rouen, observed that it was improper to confound a thing liable to litigation, with a litigious one. 11 *Jur. Code Civil*, 451. When the thing ceded is not contested, and is not the subject of a suit, at the time of the cession, the thing is not litigious. 13 *Id.* 49. 13 *Pand. Fr. n.* 119.

We conclude, that, as there was no suit instituted in the present case, at the time the defendants purchased the right of Hebert's heirs, they did not purchase a litigious one.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs of suit in both courts.

*** There was no case determined in October or November.